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Head Versus Heart: Applying Empirical Evidence About the Connection Between Child Pornography and Child Molestation to Probable Cause Analyses

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HEAD VERSUS HEART: APPLYING EMPIRICAL EVIDENCE ABOUT THE CONNECTION BETWEEN CHILD PORNOGRAPHY AND CHILD MOLESTATION TO PROBABLE CAUSE ANALYSES

*Emily Weissler**

As the internet has become nearly ubiquitous, child pornography possession has become increasingly widespread. Law enforcement efforts to combat the reach of these images have become increasingly aggressive and sophisticated. Sentences have also dramatically increased. As of 2008, the mean sentence for child pornography possession was ninety-two months, with a mandatory minimum sentence of five years.

Circuit courts have confronted child pornography search warrant applications based mainly upon a prior child molestation conviction or enticement of a minor. Evaluating similar fact patterns, the Second, Sixth, and Ninth Circuits have held that child molestation or child enticement cannot be used to establish probable cause for a child pornography search warrant because the connection between the two acts is not well established. However, the Eighth Circuit disagreed, holding that there is an intuitive relationship between both crimes, which can establish probable cause.

This four-part Note analyzes the circuit court split using empirical evidence about the connection between child pornography and child molestation. Although it is a relatively new area of study, social science literature has begun to address the connection between possession of child pornography and child molestation. This Note concludes that, given the relative uncertainty in social science literature, more research should be done before reaching the Eighth Circuit's holding. A prior conviction for child molestation or an attempt to entice a child should not be enough to establish probable cause to search an individual's home for child pornography.

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TABLE OF CONTENTS

INTRODUCTION

In February 2012, George Fout, a twenty-five-year-old Boy Scout volunteer and computer company owner, was arrested for child pornography possession at the home he shared with his parents.[1] He was arrested after police tracked child pornography downloads back to his computer.[2] The detective assigned to the case said that the graphic images Fout possessed involved boys ages seven, nine, and twelve.[3] Following his arrest, Fout admitted to molesting several young boys, but told detectives that he watched child pornography as a way to control his urges to molest children.[4] Fout pleaded no contest to twenty-seven counts of child pornography possession in late September 2012.[5] He was also given two life sentences after being convicted of one count of sexual battery and three counts of lewd or lascivious battery and molestation after he admitted to molesting an eight-year-old boy.[6] Fout's story is in many ways a typical one that has been retold across the nation all too many times in the past decade.

Arrests and prosecutions for child pornography–related offenses have soared dramatically over the past fifteen years. In the 2009 fiscal year alone, the FBI arrested over 10,000 individuals for failing to register as sex

1. Austin L. Miller, *Suspected Child Molester May Have More Victims*, OCALA.COM (Feb. 22, 2012, 6:53 AM), http://www.ocala.com/article/20120222/ARTICLES/120229904?p=1&tc=pg&tc=ar.

2. *See id.*

3. Austin L. Miller, *Man in Silver Spring Shores Charged with Possession of Child Porn*, OCALA.COM (Feb. 21, 2012, 7:50 PM), http://www.ocala.com/article/20120221/ARTICLES/120229924?tc=ar.

4. Vishaul Persaud, *Child Porn Trial Set Sept. 25 for Scout Volunteer*, OCALA.COM (Aug. 24, 2012, 10:03 AM), http://www.ocala.com/article/20120824/ARTICLES/120829824?tc=ar. "Fout referred to himself as a monster and said it was a mistake that he was born." *Id.*

5. Vishaul Persaud, *Fout's First Child Molestation Trial Set for Next Week*, OCALA.COM (Oct. 26, 2012, 9:40 AM), http://www.ocala.com/article/20121026/ARTICLES/121029791.

6. Vishaul Persaud, *Former Scout Volunteer Found Guilty of Molesting 8-Year-Old Boy*, OCALA.COM (Nov. 1, 2012, 2:11 PM), http://www.ocala.com/article/20121101/ARTICLES/121109974.

offenders and/or for actual sexual offenses.[7] In 2009, 2,427 suspects were indicted for child pornography offenses.[8] These numbers reflect only federal cases; state prosecutors also zealously investigate and prosecute these crimes.[9] As the numbers of indictments and prosecutions have grown, sentences have also increased. In 1990, the maximum sentence under federal law for child pornography possession was ten years in prison, and by 2003, the maximum was twenty years.[10] Currently, there is a five-year mandatory minimum sentence for receipt of child pornography,[11] and sentencing guidelines call for much longer sentences based upon the type of images, the number of images in a collection, and the ages of the children depicted.[12]

As arrests and sentences have increased, the public debate over child pornography has become polarized. Some have criticized these sentences as overly punitive,[13] while others have responded that child pornography possession can serve as a gateway to molesting children and that possession supports the industry of production.[14] A body of social science literature has developed that attempts to assess the connection between these two crimes.[15] Courts impact the discussion in the search warrant and sentencing context.[16] However, scholars and judges are not in a dialogue with one another, which has important implications for the use of our judicial resources as we try to combat the spread of child pornography images.

Part I of this Note discusses the evolution of societal attitudes towards child pornography and how federal child pornography laws have changed in response to those attitudes, as well as how child pornography is accessed and combated. Part II analyzes the social science research that explores the connection between child pornography and child molestation. Part III discusses a circuit court split regarding whether a child molestation

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7. U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 5 (2010), *available at* http://www.justice.gov/psc/docs/natstrategyreport.pdf.

8. *Id.*

9. *See* Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 857–60 (2011); U.S. SENTENCING COMM'N, FEDERAL CHILD PORNOGRAPHY OFFENSES 38 (2012), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/Full_Report_to_Congress.pdf.

10. *See* Hessick, *supra* note 9, at 857.

11. A.G. Sulzberger, *Defiant Judge Takes on Child Pornography Law*, N.Y. TIMES, May 22, 2010, at A1.

12. *See* Jennifer A. McCarthy, The Relationship Between Child Pornography and Child Molestation 31 (2010) (unpublished Ph.D. dissertation, The City University of New York) (on file with *Fordham Law Review*); *see also* Hessick, *supra* note 9, at 861 (attributing the increase in child pornography possession sentences to the various sentencing enhancements now available to judges).

13. *See infra* notes 116–18 and accompanying text.

14. *See* Memorandum from Alexandra Gelber, Assistant Deputy Chief, Child Exploitation and Obscenity Section, Criminal Division, U.S. Dep't of Justice 4 (July 1, 2009), *available at* http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2010/009c_Reluctant_Rebellion_Response.pdf.

15. *See infra* Part II.

16. *See infra* Part I.C.

conviction or an attempt to entice a minor establishes probable cause to search an individual's computer or home for child pornography.[17] Finally, Part IV applies the research from Part II to the circuit split detailed in Part III and argues that an allegation or evidence of child molestation is insufficient to establish probable cause for child pornography possession because child pornography possessors and contact offenders are too heterogeneous a group.

I. SETTING THE STAGE FOR THE SPLIT

Child pornography possession has not always been met with the intense level of opprobrium that it currently receives. This Part discusses the historical background surrounding the change in attitudes and the evolution of federal child pornography statutes and relevant Supreme Court cases. It also explores how child pornography is accessed and how law enforcement officers attempt to combat the spread of these images. Finally, this Part concludes by addressing the demographics of child pornography collectors, the motivating factors behind the collection of child pornography, the probable cause standards for search warrants, and the application of the exclusionary rule.

A. Child Pornography: Definitions and Historical Background

Under federal law, child pornography is defined as a visual depiction of a minor engaged in sexually explicit conduct.[18] "Sexually explicit conduct" is defined as "actual or simulated: (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person."[19] A minor is someone who has not reached his or her eighteenth birthday.[20] Described another way, child pornography is material that visually depicts sexual conduct of children; it is illegal to possess even when it is not legally obscene.[21] To be obscene, pornography must, at a minimum, "depict or describe patently offensive 'hard core' sexual conduct," according to the standard set forth by the U.S. Supreme

17. The Second, Sixth, and Ninth Circuits have held that child molestation or child enticement cannot be used to establish probable cause in a child pornography search because the connection between the two acts is not well established. However, the Eighth Circuit disagreed, holding that there is an intuitive relationship between both crimes, which can establish probable cause.

18. *See* 18 U.S.C. § 2252(a)(1)(A) (2006); *see also* KENNETH V. LANNING, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS 81 (5th ed. 2010), *available at* http://www.missingkids.com/en_US/publications/NC70.pdf (offering commentary on what qualifies as child pornography).

19. 18 U.S.C. § 2256(2)(A).

20. *See id.* § 2256(1).

21. *See* Henry Cohen, *Child Pornography: Constitutional Principles and Federal Statutes*, *in* GOVERNMENTAL PRINCIPLES AND STATUTES ON CHILD PORNOGRAPHY 1 (Walker T. Holliday ed., 2003).

Court in *Miller v. California*.[22] However, the standard established in *Miller* for obscene material does not apply to child pornography because the Supreme Court found that there is a "compelling" and "surpassing" interest in the protection of children, which makes child pornography unique.[23]

Child pornography first entered the public consciousness in the 1970s and has been treated with horror and disgust since that time.[24] Prior to the 1970s, society had a looser set of standards regarding the boundary between adult and child sexuality.[25] Until the 1880s, the age of consent for sexual intercourse for girls in the United States was ten.[26] However, there were laws criminalizing "immoral" activities like adultery, bestiality, and homosexuality.[27] These statutes survived well into the twentieth century; for example, Boston recorded 242 arrests for adultery in 1948.[28] There were waves of panic about perceived increases in sex crimes in 1937, 1947–50, and 1953–54.[29] These periods were characterized by inflammatory articles in magazines like *Time*, *Newsweek*, *Parents*, and *Collier's*, warning about sex hoodlums who preyed on the young.[30]

Then, in the 1960s, there was a general relaxation of censorship standards, and pornographic pictures and films of children became more widely available.[31] In the mid-1970s, child pornography was primarily transmitted via magazines and booksellers.[32] Foreign-produced child pornography was of poor quality, consisting of reproductions of black and white photographs featuring ten- to fifteen-year-old minors.[33] In contrast, the child pornography produced in the United States was of much better quality and was accompanied by a storyline or text.[34]

A ferocious backlash to these more relaxed standards emerged in the late 1970s.[35] This moral backlash was attributable in part to fears that homosexuals would corrupt children by sexually molesting them, and it coincided with a significant conservative campaign launched to reverse the

22. 413 U.S. 15, 27 (1973).

23. New York v. Ferber, 458 U.S. 747, 757, 764 (1982).

24. *See* PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET 4 (2001); *see also* VIRGINIA M. KENDALL & T. MARKUS FUNK, CHILD EXPLOITATION AND TRAFFICKING 1 (2012) ("The once dark, isolated, and secretive world of child sexual exploitation is now, put simply, a global commercial reality.").

25. JENKINS, *supra* note 24, at 31–32.

26. *Id.* at 26. Even after 1900, five Southern states still had ten as the age of consent, and Delaware's age of consent was seven years old. *See* PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 24 (1998).

27. JENKINS, *supra* note 24, at 22.

28. *Id.*

29. *See id.* at 52–55.

30. *See id.* at 52. *Collier's* ran a series of articles, which reported that the number of sex crimes had gotten "out of control" and that women were afraid to venture into the streets at night. *Id.* at 53.

31. *See* JENKINS, *supra* note 24, at 31.

32. *See id.* at 31–32; *see also* McCarthy, *supra* note 12, at 1.

33. *See* McCarthy, *supra* note 12, at 1. The typical foreign pornographic magazine sold for between $6 and $12. *Id.* at 1–2.

34. *See id*. The average domestically produced magazine sold for around $25. *Id.* at 2.

35. *See* JENKINS, *supra* note 24, at 33.

social and political progress made by homosexuals.[36] This moral campaign was justified with statistics that grossly overestimated the number of children being harmed by child pornography.[37] For example, in 1986, an antipornography crusader stated that "each year, fifty thousand missing children are victims of [child] pornography."[38] However, these statistics were exaggerated: no major child pornography rings were ever discovered, and all of the figures can be traced back to the rhetoric of well-intentioned activists.[39] This moral panic and outrage were instrumental in elevating child pornography into the national consciousness as a political issue.[40]

Following the moral panic of the 1970s, Congress was spurred to action. The first statute to criminalize child pornography was the Protection of Children Against Sexual Exploitation Act of 1977[41] (PCASE). PCASE was motivated by congressional findings that child pornography was being transmitted through interstate and foreign commerce, and that existing laws were not protecting children adequately.[42] PCASE prohibited the manufacture or commercial distribution of obscene materials involving subjects younger than sixteen years old.[43] PCASE eliminated the availability of child pornography materials in adult stores,[44] but other than this fairly limited impact, its reach and use proved narrow.[45]

Following the passage of PCASE, the Supreme Court recognized that child pornography had become a serious national problem.[46] In 1982, the Court held in *New York v. Ferber* that child pornography was not entitled to First Amendment protection.[47] The court stated that "distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children."[48] It noted that preventing this abuse was a governmental objective of the highest importance.[49] Meanwhile, the American public continued to be highly concerned about the threat posed to the nation's children by sexual predators.[50]

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36. *See* JENKINS, *supra* note 26, at 124.

37. *See* JENKINS, *supra* note 26, at 147–48. As an example, Jenkins cites statistics from the Los Angeles Police Department alleging that at least 300,000 children in the United States under the age of sixteen were involved in the nationwide child pornography trade. *Id.* at 147.

38. *Id.*

39. *See id.* at 147–48; *see also* JENKINS, *supra* note 24, at 34–35.

40. *See* McCarthy, *supra* note 12, at 10.

41. Pub. L. No. 95-225, 92 Stat. 7 (1978); *see also* KENDALL & FUNK, *supra* note 24, at 70.

42. *See* S. REP. NO. 95-438, at 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 42–43.

43. *See* JENKINS, *supra* note 24, at 35.

44. *See id.*

45. *See* KENDALL & FUNK, *supra* note 24, at 70.

46. *See* New York v. Ferber, 458 U.S. 747, 749 n.1 (1982) ("Child pornography . . . [is a] highly organized, multimillion dollar industr[y] that operate[s] on a nationwide scale." (quoting S. REP. NO. 95-438, at 5)).

47. *See id.* at 774.

48. *Id.* at 759.

49. *See id.* at 757–58.

50. *See* JENKINS, *supra* note 26, at 147.

Following the Court's decision in *Ferber*, in 1984, Congress passed the Child Protection Act[51] (CPA). The CPA amended PCASE by removing the "obscenity test" and the focus on obscene material, and it instead prohibited material involving minors engaged in sexually explicit conduct, a change in line with *Ferber*.[52] The 1984 Act also amended the definition of a minor, changing it from sixteen to eighteen, which extended the status of minor to about 7 million more American adolescents.[53]

In response to technological advances that were outpacing statutes, Congress further amended the CPA by passing the Child Protection and Obscenity Enforcement Act of 1988.[54] The 1988 Act made it illegal to use a computer to transport or move child pornography.[55] Legislators were very concerned about the advent of the internet and cable technology and the opportunity this presented for child pornographers.[56] Two years later, in *Osborne v. Ohio*, the Supreme Court validated the hardened attitudes of Congress and the public by holding that the right to possess obscene material in one's home did not extend to child pornography.[57] The holding in *Osborne* was codified by the Crime Control Act of 1990, which criminalized simple possession of child pornography.[58] These new laws and Supreme Court decisions were the results of decades of moral panic and furthered the goals of aggressive prosecutors and antipornography activists.[59]

In 1996, Congress enacted the Child Pornography Prevention Act (CPPA), which further expanded the reach of child protection statutes.[60] The CPPA broadened the definition of child pornography to include images that were not even made with actual minors, such as virtual pornography, and it also criminalized the possession of electronically stored data.[61]

The new provisions of the CPPA were challenged for being overly broad.[62] In 2002, in *Ashcroft v. Free Speech Coalition*, the Supreme Court declared that the provision of the CPPA prohibiting "virtual" images of minors was unconstitutional.[63] However, even though the Court struck down a provision of the CPPA, the Court reaffirmed its commitment to

51. Pub. L. No. 98-292, 98 Stat. 204 (1984).
52. KENDALL & FUNK, *supra* note 24, at 70.
53. *See* JENKINS, *supra* note 26, at 149.
54. Pub. L. No. 100-690, 102 Stat. 4485.
55. *See* JENKINS, *supra* note 24, at 38.
56. 134 CONG. REC. 15,292 (1988) (statement of Rep. Jack Buechner) ("Congress must educate the public of the severity and tragedy that child pornography has brought to this nation. From child abuse to cable porn, the vulgarity and licentiousness of this ever-growing industry is a poison to our society . . . .").
57. Osborne v. Ohio, 495 U.S. 103, 109–11 (1990).
58. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789.
59. *See* JENKINS, *supra* note 26, at 138.
60. Child Pornography Prevention Act, Pub. L. No. 104-208, 110 Stat. 3009–26 (1996).
61. KENDALL & FUNK, *supra* note 24, at 71.
62. *See* Cohen, *supra* note 21, at 27.
63. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 256 (2002) (commenting that virtual child pornography was distinguishable because it did not depict actual minors).

Ferber and emphasized the societal harm caused by child pornography.[64] The Court distinguished *Ferber*, noting that in *Ferber*, the speech itself was "the record of sexual abuse, [whereas] the CPPA prohibits speech that records no crime and creates no victims by its production."[65]

In response to continually changing technology, in 2003, Congress enacted the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act[66] (PROTECT Act). The PROTECT Act added a new pandering and solicitation provision to 18 U.S.C. § 2252A and increased the penalties associated with child pornography crimes.[67] The Senate Committee on the Judiciary noted the continually evolving nature of technology in its report.[68] Specifically, the report cited information provided by the National Center for Missing and Exploited Children that technology existed to disguise depictions of real children and make them appear to be computer generated.[69] The pandering provision criminalizes attempts to trade material that does not involve any actual children as long as a party to the trade believes or asserts that it does.[70] Additionally, section 2256(2)(A) of the Act defined sexually explicit conduct as "actual or simulated" sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area of any person.[71] In 2008, in *United States v. Williams*, the Supreme Court upheld several challenges to section 2256(2)(A), including the pandering provision.[72] Finally, in the PROTECT Our Children Act of 2008, Congress proscribed the production or distribution of a pornographic image that was adapted from a picture of an identifiable minor.[73] However, this legislation has not successfully eradicated the trade of child pornography images, and they are still widely available on the internet.[74]

64. *See id.* at 249. "The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of decent people." *Id.* at 244.

65. *Id.* at 250.

66. Pub. L. No. 108-21, 117 Stat. 650 (2003).

67. KENDALL & FUNK, *supra* note 24, at 73–74; *see also* U.S. DEP'T OF JUSTICE, 03-266, FACT SHEET PROTECT ACT (2003), *available at* http://www.justice.gov/opa/pr/2003/April/03_ag_266.htm. The press release notes, "In one recent child pornography case, a judge departed downward in part on the ground that the defendant had a 'diminished capacity' due to the fact that he 'was extremely addicted to child pornography.' The bill ensures that pedophiles will not be able to get reduced sentences just because they are pedophiles." *Id.*

68. 149 CONG. REC. 8972 (2003).

69. *Id.*

70. Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 CARDOZO L. REV. 1679, 1685 (2012).

71. 18 U.S.C. § 2256(2)(A) (2006).

72. United States v. Williams, 553 U.S. 285, 290, 307 (2008) ("Child pornography harms and debases the most defenseless of our citizens.").

73. Providing Resources, Officers, and Technology To Eradicate Cyber Threats to Our Children Act of 2008, Pub. L. No. 110-401, 122 Stat. 4229.

74. *See* U.S. SENTENCING COMM'N, *supra* note 9, at 41–43.

B. Accessing Child Pornography

The near ubiquity of the internet has made child pornography far more accessible. Indeed, the internet has been characterized as offering the "triple A engine" of anonymity, availability, and affordability.[75] Even before internet access was widespread, deviant individuals were capitalizing on the privacy afforded by the internet.[76] In addition to making it easier to exchange and access child pornography, the internet has created "communities" for those who are interested in this type of material.[77] These communities provide a forum for discussion about how to avoid law enforcement, and members provide justifications for viewing child pornography and molesting children.[78] Further, the methods for sharing this material have become more sophisticated through the use of devices like internet chat rooms, newsgroups, and peer-to-peer networks.[79]

The methods used to avoid detection are technologically advanced. The individuals possessing the images are constantly trying to develop new ways to elude law enforcement.[80] For example, when child pornography is sent via email, it can either be embedded in the email or attached to the email.[81] To maintain anonymity, it is possible to re-route the email through "anonymous remailers," which remove some of the indentifying information from the email.[82] Email is not the most efficient method to share child pornography, however. For example, one child pornography collector, using the online name Godfather Corleone, advised a novice, "[t]rading thru e-mail is a rather un-efficient way to get pics. Learn about using newsgroups instead, that way you will be able to fill a few CD's every week ;)."[83]

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75. *See* McCarthy, *supra* note 12, at 21 (noting that child pornography can be viewed anonymously from one's home and even on one's cell phone).

76. *See* ATTORNEY GEN.'S COMM'N ON PORNOGRAPHY, FINAL REPORT 629 (1986) ("Recently however, pedophile offenders and child pornographers have begun to use personal computers for communications.").

77. *See* McCarthy, *supra* note 12, at 21; *see also* Amy E. Wells, Comment, *Criminal Procedure: The Fourth Amendment Collides with the Problem of Child Pornography and the Internet*, 53 OKLA. L. REV. 99, 101–02 (2000) (highlighting various online communities of individuals interested in child pornography).

78. JENKINS, *supra* note 24, at 106–10; *see also* LANNING, *supra* note 18, at 89 ("Sex offenders get *active* validation from other offenders, some victims, and occasionally from undercover law-enforcement officers operating 'sting' operations.").

79. Laurie E. Ekstrand, *Combating Child Pornography: Federal Agencies Coordinate Law Enforcement Efforts, but an Opportunity Exists for Further Enhancement*, *in* GOVERNMENTAL PRINCIPLES AND STATUTES ON CHILD PORNOGRAPHY, *supra* note 21, at 29. Jenkins states that there are four main ways that child pornography images are shared: newsgroups, corporate-linked "communities," web-based bulletin boards, and closed groups. JENKINS, *supra* note 24, at 53.

80. *See* KENDALL & FUNK, *supra* note 24, at 18.

81. *See* McCarthy, *supra* note 12, at 22.

82. *Id.*

83. JENKINS, *supra* note 24, at 55.

Moving up the scale of technological complexity are newsgroups.[84] A newsgroup user will be able to post messages to a group, read existing messages that have already been posted, and download files containing child pornography.[85] In this forum, "child pornographic images 'act as a form of currency, legitimizing activity and creating social cohesion.'"[86] Although it sounds simple to access these groups, many internet servers will not carry the sites, and although there are ways around this, they require technical expertise.[87]

Another method of sharing these images is via peer-to-peer networks, which were originally developed for sharing music.[88] Individuals connect to the network and search for files, usually labeled to identify the type of child pornography they contain, and then download the ones they want from a shared pool.[89] There are conflicting views about how easily images are actually shared through these networks.[90] However, a 2003 report from the General Accounting Office used KaZaA, a popular peer-to-peer site, to search for image files using twelve keywords known to be associated with child pornography images.[91] Of the 1,286 images identified in the search, about 42 percent were associated with child pornography images.[92]

Courts have found a defendant liable for offering to distribute child pornography by placing it in a peer-to-peer file sharing system.[93] In *United States v. Sewell*, the Eighth Circuit found that the purpose of peer-to-peer software was to allow users to download each other's files, and that placing a file in a shared folder with descriptive text was an offer to distribute child pornography.[94]

Even with the technological protections provided by each of these methods, members of the child pornography community are still very suspicious of individuals who attempt to join these communities, because of

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84. *See* McCarthy, *supra* note 12, at 23 (citing academics who found that newsgroups were the second most commonly used means of obtaining child pornography).

85. *See id.*

86. *Id.*; *see also* Jennifer Stewart, *If This Is the Global Community, We Must Be on the Bad Side of Town: International Policing of Child Pornography on the Internet*, 20 HOUS. J. INT'L L. 205, 215 (1997) (commenting on challenges to combating child pornography presented by newsgroups and other forms of technology).

87. *See* JENKINS, *supra* note 24, at 56–57.

88. *See* McCarthy, *supra* note 12, at 24; *see also* U.S. SENTENCING COMM'N, *supra* note 9, at 51.

89. McCarthy, *supra* note 12, at 24.

90. *Id.* (comparing Linda D. Koontz, *Peer-to-Peer File-Sharing Facilitates the Dissemination of Child Pornography*, *in* CHILD PORNOGRAPHY 55 (Amanda Hiber ed., 2009), with M.C. Lafferty, *The Threat of P2P File-Sharing for Child Pornography Is Exaggerated*, *in* CHILD PORNOGRAPHY, *supra*, at 64).

91. Linda D. Koontz, *File-Sharing Programs: Child Pornography Is Readily Accessible over Peer-to-Peer Networks*, *in* GOVERNMENTAL PRINCIPLES AND STATUTES ON CHILD PORNOGRAPHY, *supra* note 21, at 80–81.

92. *Id.*

93. *See* United States v. Sewell, 513 F.3d 820, 821–22 (8th Cir. 2008).

94. *Id.* at 822; *see also* United States v. Shaffer, 472 F.3d 1219, 1223–24 (10th Cir. 2007) (holding that an offender's use of peer-to-peer software to freely allow others to access the child pornography on his computer constituted the distribution of child pornography).

the fear that newcomers may be undercover law enforcement officers.[95] For example, when members of a child pornography community detect an intruder, they may respond aggressively. "The ruse is immediately detected because the wording and content are unfaithful to what is expected . . . [t]he imposter will be threatened by dozens of angry participants . . . warning of virus attacks if the crime is repeated."[96] These intruders can be suspected law enforcement officers or even new members who try to assume the identity of an elite figure within the online community.[97] This intense reaction shows how insular these groups are and how they attempt to cloak devious behavior in normalcy.[98] The close communities formed by child pornography collectors make it even more difficult for law enforcement to stop the spread of these images.

C. Combating the Spread of Child Pornography

The United States is extremely aggressive in its efforts to combat the spread of child pornography.[99] Law enforcement agencies have made child pornography prosecutions one of their top priorities.[100] As the internet first developed in the 1990s, efforts were focused on the morally hazardous material available to children.[101] Currently, the focus is on the possession and exchange of pornographic images.[102] The federal law enforcement agencies that try to combat child pornography include the Federal Bureau of Investigation (FBI), Immigration and Customs Enforcement (ICE), the United States Postal Inspection Service, and the Secret Service.[103]

The prosecution of federal child pornography cases has significantly increased: in 1998, 428 cases were prosecuted, and in 2002, 692 cases were prosecuted.[104] In 2007, the U.S. Department of Justice (DOJ) announced that a priority goal of the agency was to combat child pornography.[105] Congress formalized this role in 2008 by tasking the DOJ with formulating and implementing a plan to combat child exploitation across the nation.[106] In 2009, 2,427 suspects were indicted at the federal level.[107] In 2010, the DOJ said prosecutions were up 40 percent since 2006.[108] In response to

95. *See* JENKINS, *supra* note 24, at 95.
96. *Id.*
97. *Id.* at 96–97.
98. *Id.*
99. *See* KENDALL & FUNK, *supra* note 24, at 3; *see also* Hamilton, *supra* note 70, at 1692–93.
100. *See* Louis J. Freeh, *Child Pornography on the Internet and the Sexual Exploitation of Children*, *in* GOVERNMENTAL PRINCIPLES AND STATUTES ON CHILD PORNOGRAPHY, *supra* note 21, at 130; U.S. DEP'T OF JUSTICE, *supra* note 7, at 4–6.
101. JENKINS, *supra* note 24, at 49.
102. *See* Hessick, *supra* note 9, at 859–62.
103. *See* U.S. DEP'T OF JUSTICE, *supra* note 7, at 4, 6.
104. Ekstrand, *supra* note 79, at 35.
105. Hamilton, *supra* note 70, at 1689.
106. Providing Resources, Officers, and Technology To Eradicate Cyber Threats to Our Children Act of 2008, Pub. L. No. 110-401, § 101, 122 Stat. 4229.
107. U.S. DEP'T OF JUSTICE, *supra* note 7, at 5.
108. *Id.*

Congress's directive, the DOJ released its initial strategy document in 2010, describing a national and coordinated initiative designed to involve as many federal agencies and law enforcement officials as possible.[109]

The increase in cases and sentences can be at least partially attributed to their high priority for the DOJ, as well as the mandatory five-year minimum sentences required postconviction for possession of child pornography.[110] For offenders convicted of possession, receipt, or distribution of child pornography, the mean sentence has risen from approximately twenty-one months in 1997 to ninety-two months in 2008.[111] The mean sentence for child pornography offenders is also currently greater than many other serious crimes, including manslaughter, robbery, arson, and drug trafficking.[112] On the state level, sentences can vary widely from thirty days in jail (Oklahoma) to 100 years (Montana).[113] States consider a number of different factors in sentencing, such as the victim's age (Alabama), the size of the collection (Connecticut), the number of previous offenses the individual has (California), and even the extreme nature of the images the individual possesses (Vermont).[114] Legislators hope that harsh sentences will deter individuals from downloading these images, but that has not been substantiated.[115]

However, aggressive sting operations and harsh sentencing decisions have not been met with universal approval. One critic argues, "Methods employed by federal agencies often came perilously close to entrapment."[116] Another major criticism is that prosecutors and investigators go on "witch hunts" for those who merely possess images of child pornography and that courts then impose "draconian" sentences on possessors.[117] Although certainly not in the majority, there are individuals who are supportive of relationships between adults and children and believe

109. *See id.* The report notes that prosecutors and investigators have seen an increase in violent and sadistic conduct depicted in the images, and that all individuals interviewed for the threat assessment reported connections between child pornography offenses and contact offenses. *Id.* at 9.

110. *Child Porn Prosecutions Soaring*, NEWSMAX (Feb. 5, 2011, 2:24 PM), http://www.newsmax.com/US/ChildPornProsecutions/2011/02/05/id/385095.

111. Hamilton, *supra* note 70, at 1686.

112. *See id.* at 1686–87; *see also* KENDALL & FUNK, *supra* note 24, at 323 (noting that in addition to the mandatory minimum sentence of five years, sentences can be enhanced for distributing child pornography (which includes peer-to-peer file sharing) and the type of child pornography that the exploiter possesses (for example, if the offender's collection includes images of children under the age of twelve, a two-level enhancement is required)).

113. McCarthy, *supra* note 12, at 31.

114. *Id.* at 31–33.

115. *See* Memorandum from Alexandra Gelber, *supra* note 14, at 8–9.

116. JENKINS, *supra* note 26, at 152–53. For example, FBI agents have posted links to videos that purport to depict minors having sex, and have then arrested the individuals who click on the links. Declan McCullagh, *FBI Posts Fake Hyperlinks To Snare Child Porn Suspects*, CNET (Mar. 20, 2008, 4:00 AM), http://news.cnet.com/8301-13578_3-9899151-38.html.

117. *See* KENDALL & FUNK, *supra* note 24, at 3.

that the idea of child sexual "exploitation" is simply a social construct used by a puritanical society.[118]

Even judges have pushed back against their lack of flexibility in sentencing those convicted of possessing child pornography.[119] In 2010, federal judges deviated from the sentencing guidelines in 43 percent of child pornography cases, as compared to 18 percent of all other cases.[120] In an interview given following a sentencing, Judge Jack Weinstein of the Eastern District of New York said, "Convincing evidence demonstrates that [the defendant] presents no appreciable risk to any child or adult, but that [the defendant] needs treatment for childhood based psychiatric problems."[121] However, Judge Weinstein was still bound to give the defendant the mandatory five-year sentence.[122] Yet, there are also critics on the other side who feel that the efforts and punishments of the U.S. government do not go far enough.[123]

There is a serious question as to whether judges, prosecutors, academics, and the press are in communication with each other about the most effective means of tackling the problem of child pornography.[124] For example, prosecutors, whose main goal is to prosecute child pornography cases, may not be aware of the "complex legal and psychological nuances" associated with child pornography investigations.[125] Similarly, a victim's rights advocate may not understand how her interaction with the victim can actually be used to impeach the victim's version of events in court.[126] Additionally, the media has been accused of distorting public perception of the child pornography issue by focusing on sensational cases.[127]

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118. *Id.* at 9–10 ("People seem to think that any (sexual) contact between children and adults has a bad effect on the child. I say this can be a loving and thoughtful, responsible sexual activity." (citing Michael Ebert, *Pedophilia Steps into the Daylight*, FOCUS ON FAM. CITIZEN, Nov. 16, 1992, at 6–8)).

119. *Child Porn Prosecutions Soaring*, *supra* note 110.

120. Milton J. Valencia, *US Judges Balk at Rigid Child Porn Sentences*, BOS. GLOBE, Feb. 12, 2012, at A1.

121. *Child Porn Prosecutions Soaring*, *supra* note 110.

122. *Child Porn Prosecutions Soaring*, *supra* note 110; *see also* Rachel Aviv, *The Science of Sex Abuse*, NEW YORKER, Jan. 14, 2013, at 36, 38 (quoting Melissa Hamilton, a law professor at the University of Houston Law Center, who said that "law makers have treated pornography possession . . . [as] 'a kind of proxy—a way to incapacitate men who we fear have already molested someone, or will in the future'"); Sulzburger, *supra* note 11 (quoting Judge Weinstein on the subject of harsh sentences).

123. KENDALL & FUNK, *supra* note 24, at 11 ("[T]hese offenders have committed a sex crime and as a result have demonstrated a lack of mastery over their fantasies . . . . Castration is justified to help control their behavior." (alterations in original) (quoting Charles L. Scott & Trent Holmberg, *Castration of Sex Offenders: Prisoners' Rights Versus Public Safety*, 31 J. AM. ACAD. PSYCHIATRY L. 502 (2003)) (internal quotation mark omitted)).

124. *Id.* at 3; *see also* Mark Hansen, *A Reluctant Rebellion*, 95 A.B.A. J. 54, 56 (2009) (discussing the controversy over child pornography prosecutions).

125. *See* KENDALL & FUNK, *supra* note 24, at 3.

126. *Id.* at 3–4. For example, a statement elicited by the advocate "can subsequently be used in court to impeach the victim's version of events," or may be disclosed to the victim's family or cause retaliation at the hands of her abuser. *Id.*

127. *Id.* at 7–8.

Much of the discussion about the correct approach to child pornography is connected to the idea that child molestation and exploitation are closely linked to the possession of child pornography. The media, judges, and prosecutors have all alleged that there is a relationship, and sometimes a correlation, between the two behaviors.[128] For example, in November 2011, the Ohio Attorney General, Mike DeWine, announced new legislation targeted at internet predators.[129] In his announcement he stated, "At a minimum, 40 percent of those who view child pornography end up molesting children as a result . . . . [S]ome estimates [are] as high as 80 percent."[130] Statements alleging a link between child pornography and child sexual abuse make it easier for legislators to justify their aggressive tactics and punitive sentences.[131]

D. Demographic Data About Child Pornography Collectors and Their Motivations Behind Collection

The research on child pornography has highlighted some insightful demographic characteristics of child pornography collectors that may be relevant to understanding the behavior of these individuals. Child pornography collectors are generally white males, between twenty-five and fifty years old, with no prior criminal background.[132] They are generally more educated, of higher intelligence, more likely to be employed, and more likely to be in a relationship than those who commit contact sexual offenses against children.[133] As part of the National Juvenile Online Victimization Study, researchers conducted 612 interviews with police officers, and 429 of these cases involved sex offenders who possessed child pornography.[134] The study showed that the majority of offenders were white men, 41 percent were single, 38 percent were married or living with a

128. *See id.* at 19; LANNING, *supra* note 18, at 107–08; McCarthy, *supra* note 12, at 3 ("[P]ossession of child pornography becomes synonymous with the perpetration of child sexual abuse which does not comport with empirical knowledge/reality.").

129. Aaron Marshall, *Mike DeWine Cites Link Between Viewing Child Pornography and Molestation Cases*, POLITIFACT (Nov. 30, 2011, 10:00 AM), http://www.politifact.com/ohio/statements/2011/nov/30/mike-dewine/mike-dewine-cites-link-between-viewing-child-porno/. When asked to provide support for his statements, DeWine provided several studies, two of which are discussed in Part II of this Note: the Butner Prison Study and the N-JOV Study from 2005. *See infra* Part II.A.

130. Marshall, *supra* note 129 (internal quotation marks omitted). The article goes on to note that this statistic has not been widely accepted. *Id.*

131. *See* Hessick, *supra* note 9, at 864–65. Part II of this Note addresses whether this connection is actually supported by empirical data.

132. L. Webb et al., *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters*, 19 SEXUAL ABUSE: J. RES. & TREATMENT 449, 450 (2007) (citing Anne Burke et al., *Child Pornography and the Internet: Policing and Treatment Issues*, 9 PSYCHIATRY PSYCHOL. & L. 79 (2002)).

133. *Id.*

134. JANIS WOLAK ET AL., CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY, at xi (2005), *available at* http://www.unh.edu/ccrc/pdf/jvq/CV81.pdf.

partner, and 20 percent were divorced.[135] As to the level of education that they had obtained, 38 percent had finished high school, 21 percent had some college education or technical training, and 16 percent had graduated from college.[136] About half of the offenders had direct access to minors through their job, a youth activity, or in their home.[137] The vast majority of them did not have a diagnosed mental illness, a diagnosed sexual disorder, or known incidents of violence.[138] The number and types of images that they possessed varied: 39 percent of the arrested child pornography possessors had video images, 48 percent had more than 100 graphic images, and 14 percent had 1,000 or more graphic images.[139]

These statistics paint a picture of a fairly demographically coherent group of offenders.[140] However, the motivation behind each individual's collecting behavior is certainly not coherent.[141] As will be discussed below, there are some scholars who believe that an individual's child pornography collection is a reflection of his sexual preferences—so collecting child pornography means the individual is a pedophile.[142] However, other research has suggested that the motivation to collect child pornography exists along a continuum, ranging from individuals who are solely collectors, to those who collect and actively seek validation for their interests, to those who swap/trade/sell child pornography, to those who produce child pornography, to those who both collect child pornography and abduct children.[143] Possession of child pornography may be a means to avoid real-life problems, given that it can provide the collector with sexual gratification as well as an online community of likeminded individuals.[144]

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135. *Id.* at 2. These statistics can be compared to U.S. Census statistics from 2011: among men eighteen years and older, 50 percent are currently married, 9.7 percent are divorced, and 36 percent have never been married. *Marital Status 2011 American Community Survey 1-Year Estimates*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_S1201&prodType=table (last visited Nov. 22, 2013).

136. WOLAK ET AL., *supra* note 134, at 2. These statistics can be compared to U.S. Census statistics from 2011: of men twenty-five years old and older, 29 percent had finished high school, 21 percent had some college education, and 28 percent had graduated from either an associate or bachelors degree program. *Educational Attainment 2011 American Community Survey 1-Year Estimates*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_S1501&prodType=table (last visited Nov. 22, 2013).

137. WOLAK ET AL., *supra* note 134, at 3.

138. *Id.*

139. *Id.* at 6.

140. *See* McCarthy, *supra* note 12, at 52–53.

141. LANNING, *supra* note 18, at 89.

142. Michael C. Seto et al., *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, 115 J. ABNORMAL PSYCHOL. 610, 613 (2006).

143. *See* McCarthy, *supra* note 12, at 45; *see also* LANNING, *supra* note 18, at 89–90 (noting that child pornography fulfills the collector's important need for validation).

144. Jennifer McCarthy, *Testimony Related to the Assessment & Treatment of Child Pornography Offenders and Motivation To Collect Child Pornography*, U.S. SENTENCING COMM'N 2 (Feb. 15, 2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_15_McCarthy.pdf; *see also* Aviv, *supra* note 122, at 40 (quoting a convicted child pornography possessor who said child pornography chat rooms had become a "self-reinforcing community").

Further, individuals who are dual offenders (i.e., those who both possess child pornography and commit sexual contact offenses against children) may have different characteristics than child pornography collectors. In her dissertation, Jennifer McCarthy found results to support this conclusion.[145] The results of her study showed that contact child pornography offenders were more likely than noncontact offenders to be single, never married, and have a reported history of sexual abuse during childhood.[146] In sum, commentators agree that child pornography collectors are motivated by a wide number of factors and should not be viewed as a homogeneous class.[147]

E. Probable Cause and the Exclusionary Rule

Child pornography presents a serious threat to children in the United States.[148] Congress has recognized this threat and has passed numerous federal statutes criminalizing possession of child pornography and attempting to staunch the flow of these images.[149] Further, the Supreme Court has recognized that child pornography should be treated differently from other pornographic material, which is only illegal if obscene.[150] The widespread availability of the internet has complicated the efforts of Congress and law enforcement to combat child pornography.[151] Although the internet makes accessing the images easier, the DOJ has made child pornography prosecutions one of its top priorities.[152] To fully understand the cases discussed in Part III of this Note, a discussion of the probable cause standard applied in child pornography cases is necessary. The circuit split detailed in this Note is based upon the type of evidence that is necessary to establish probable cause to search an individual's home for child pornography.

The Fourth Amendment prohibits "unreasonable searches and seizures," and requires that "no Warrants shall issue, but upon probable cause."[153] Magistrate judges routinely assess search warrant applications, determining whether probable cause exists to authorize a search.[154] The magistrate's role, as described by the Supreme Court, is to "make a practical, common-sense decision," as to whether probable cause is present.[155] When a magistrate makes a probable cause determination, he must ask two questions: First, is the information provided in the search warrant affidavit

145. *See* McCarthy, *supra* note 12, at 42.
146. *Id.* at 93; *see infra* Part II.B.4.
147. *See* LANNING, *supra* note 18, at 89–90; McCarthy, *supra* note 12, at 44–50.
148. *See supra* Part I.A.
149. *See supra* Part I.A.1.
150. *See supra* Part I.A.
151. *See supra* Part I.C.
152. *See supra* Part I.D.
153. U.S. CONST. amend. IV.
154. 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION 122 (5th ed. 2010).
155. Illinois v. Gates, 462. U.S. 213, 238 (1983).

sufficiently reliable?[156] Second, if it is reliable, does it constitute probable cause?[157] These questions are answered using the "totality of the circumstances" analysis that was established by the Supreme Court in *Illinois v. Gates* in 1983.[158] According to *Gates*, a judge must conduct a "balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip."[159] The Supreme Court has never explicitly stated what amounts to probable cause; instead it has described it as a fluid concept, not reducible to a neat test.[160]

In cases assessing whether probable cause exists to search an individual's computer for child pornography, courts have applied the probable cause standards outlined above. As noted by the Ninth Circuit, "The 'standards for determining probable cause for a search warrant' apply to a search for child pornography on a computer."[161] In applying the totality of the circumstances test to these cases, the Ninth Circuit held, in an example of the test's application, that "[a]lthough there does not need to be direct evidence of solicitation of child pornography to create probable cause, the reviewing court must make certain there was a 'substantial basis' for the finding."[162]

However, even in instances in which a search warrant has been issued without a proper finding of probable cause by a magistrate judge, evidence will sometimes still be admitted via the good faith exception to the exclusionary rule.[163] Evidence that was obtained based on an illegal search can be admissible if the officers conducting the search acted in good faith and relied upon a facially valid search warrant.[164] In *United States v. Leon*, the Supreme Court held that the exclusionary rule, which bars the use of illegally obtained evidence, does not apply to evidence seized in "objectively reasonable reliance on" a warrant issued by a detached and

156. *See* 1 DRESSLER & MICHAELS, *supra* note 154, at 122.

157. *See id.*; *see also* Brinegar v. United States, 338 U.S. 160, 175–76 (1949) ("Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." (quoting Carroll v. United States, 267 U.S. 132, 162 (1925))).

158. *Gates*, 462 U.S. at 214. *Gates* overruled the two-prong test that the Court had established in *Aguilar v. Texas*. *See* 1 DRESSLER & MICHAELS, *supra* note 154, at 124 (citing Aguilar v. Texas, 378 U.S. 108 (1964), *overruled by Gates*, 462 U.S. at 213).

159. *Gates*, 462 U.S. at 234.

160. *See* 1 DRESSLER & MICHAELS, *supra* note 154, at 129; *see also* United States v. Frazer, No. CR12-3044, 2012 WL 5729313, at *6 (N.D. Iowa Nov. 15, 2012) ("Probable cause 'is a fluid concept that focuses on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" (quoting United States v. Colbert, 605 F.3d 573, 577 (8th Cir. 2010) (internal quotation marks omitted))).

161. Dougherty v. City of Covina, 654 F.3d 892, 897 (9th Cir. 2011) (quoting United States v. Kelley, 482 F.3d 1047, 1050 (9th Cir. 2007)).

162. *Id.* at 898 (citation omitted) (quoting United States v. Weber, 923 F.2d 1338, 1343 (9th Cir. 1990)).

163. *See* United States v. Leon, 468 U.S. 897, 922 (1984).

164. *See id.*

neutral magistrate judge.[165] The good faith exception to the exclusionary rule cannot be invoked in four circumstances:

> (1) where the issuing [judge] has been knowingly misled; (2) where the issuing [judge] wholly abandoned his or her judicial role; (3) where the application is so lacking in indicia of probable cause as to render reliance upon it unreasonable; and (4) where the warrant is so facially deficient . . . that reliance upon it is unreasonable.[166]

Thus, even in instances in which the magistrate judge has erred in finding probable cause, the evidence obtained pursuant to that warrant may still be admissible if the warrant was not obviously unreasonable.

II. WHAT IS THE EMPIRICAL CONNECTION BETWEEN CHILD PORNOGRAPHY AND CHILD MOLESTATION?

One of the most important questions in the child pornography debate centers around whether child molesters are likely to collect child pornography. If a connection can be empirically established between those who molest children and those who collect child pornography, judges, prosecutors, and other law enforcement officials can confidently rely upon this connection when making probable cause determinations.[167] Although this is a relatively new area of inquiry, there are a number of studies that address this connection.[168] Some assert that there is a connection between the two behaviors.[169] Others disagree and posit that sexual offenders are an extremely heterogeneous group, and that they should be split into a number of different categories instead of one uniform group.[170]

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165. *Id.*

166. United States v. Falso, 544 F.3d 110, 125 (2d Cir. 2008) (noting that the good faith exception does apply to evidence seized based upon a warrant lacking probable cause).

167. Courts forced to assess search warrants for child pornography based largely on child molestation evidence have pointed to the lack of conclusive research. *See* United States v. Houston, 754 F. Supp. 2d 1059, 1064 (D.S.D. 2010) (noting that instead of relying upon intuition to establish or deny the connection, "additional research would be of assistance"), *aff'd*, 655 F.3d 991 (8th Cir. 2012).

168. See Appendix A, *infra*, for a summary of the main findings and criticisms of the studies that will be discussed in this Part.

169. *See, e.g.*, WOLAK ET AL., *supra* note 134; Michael L. Bourke & Andres E. Hernandez, *The "Butner Study" Redux: A Report of the Incidence of Hands-On Child Victimization by Child Pornography Offenders*, 24 J. FAM. VIOLENCE 183 (2009); Seto et al., *supra* note 142, at 610; Andres E. Hernandez, Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet Sex Offenders (Nov. 2000) (unpublished manuscript), *available at* http://www.ovsom.texas.gov/docs/Self-Reported-Contact-Sexual-Offenses-Hernandez-et-al-2000.pdf.

170. *See, e.g.*, Michael C. Seto & Angela W. Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 201 (2005); David L. Riegel, Letter to the Editor, *Effects on Boy-Attracted Pedosexual Males of Viewing Boy Erotica*, 33 ARCHIVES SEXUAL BEHAV. 321 (2004); R. Karl Hanson & Kelly M. Babchishin, How Should We Advance Our Knowledge of Risk Assessment for Internet Sexual Offenders? (Apr. 3, 2009) (unpublished manuscript) (on file with *Fordham Law Review*); McCarthy, *supra* note 12.

This Part addresses multiple studies in support of the opposing views on whether there is a relationship between child pornography and child molestation. Additionally, this Part addresses the methodologies of the most relied upon studies and various criticisms that they have received. It also discusses various classifications of the sex offender population and the importance of these classifications regarding the connection between child pornography and child molestation.

A. Studies Asserting a Connection Between Child Pornography and Child Molestation

The Butner Prison Study[171] is widely relied upon to support the conclusion that there is a relationship between possession of child pornography and child molestation.[172] Based on self-reporting by prison inmates, the study came to the conclusion that individuals convicted of possessing child pornography are also likely to have molested children.[173] Additionally, the N-JOV Study[174] found that many child pornography possessors are dual offenders who also molest children.[175] Finally, a study conducted by a trio of researchers in 2006 produced results that indicated that child pornography possessors are more likely to be pedophiles than other types of sexual offenders.[176]

1. Butner Prison Study

The Butner Prison Study is one of the most relied upon and cited studies in this area.[177] The study has been widely cited in the news,[178] social science and law literature,[179] law enforcement communities,[180] and even

171. There were two versions of the study. The first was presented at a conference in 2000, Hernandez, *supra* note 169, and the second was published in the *Journal of Family Violence* in 2009 with updated results, Bourke & Hernandez, *supra* note 169. Unless otherwise indicated, this Note refers to these two versions collectively as the Butner Prison Study.

172. *See infra* Part II.A.1.

173. *See infra* Part II.A.1.

174. *See generally* WOLAK ET AL., *supra* note 134. This Note follows other literature discussing this report and refers to it as the N-JOV Study.

175. *See infra* Part II.A.2.

176. *See infra* Part II.A.3.

177. *See* Bourke & Hernandez, *supra* note 169; Hernandez, *supra* note 169.

178. *See, e.g.*, Julian Sher & Benedict Carey, *Federal Study Stirs Debate on Child Pornography's Link to Molesting*, N.Y. TIMES, July 19, 2007, at A20; Matt Anderson, *Controversial New Study Strongly Links Child Porn Use and Child Abuse*, LIFESITENEWS (Dec. 11, 2009, 12:15 PM), http://www.lifesitenews.com/news/archive/ldn/1991/21/9121109.

179. *See, e.g.*, LANNING, *supra* note 18, at 107; Hamilton, *supra* note 70, at 1696–98; Hessick, *supra* note 9, at 879; Carmelo Tringali, Comment, *Connecting the Dots: The Ninth Circuit's Refusal To Find Probable Cause in* Dougherty v. City of Covina, 45 LOY. L.A. L. REV. 985, 995–96 (2012); *see also* Aviv, *supra* note 122, at 43 (noting that *The "Butner Study" Redux* was cited five times in the DOJ's 2010 National Strategy for Child Exploitation Prevention and Interdiction).

180. *See, e.g.*, *Reauthorization of the Adam Walsh Act: Hearing Before the Subcomm. On Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 12

court opinions,[181] in support of the proposition that there is a connection between child molestation and child pornography.

The study is based on data collected from the residential sexual offender treatment program at the Butner Federal Prison.[182] Participation in the treatment program was voluntary,[183] and treatment included group and individual therapy, along with a psychoeducational series focusing on criminal thinking errors, management of deviant sexuality, relapse prevention, and other treatment methods.[184] Data used in the study was obtained from a review of the clinical charts of the program participants.[185] The two variables assessed were: the number of contact sexual crimes the subject was known to have committed prior to treatment,[186] and the number of self-reported contact sexual crimes divulged over the course of evaluation and treatment in the program.[187]

Program participants were divided into three groups based upon their conviction offense: (1) child pornography or traveling across state lines to sexually abuse a child (the child-porn travel group), (2) contact sex offenses involving a child or adult, and (3) nonsexual offenses.[188] The 2000 Butner Study reported that of the sixty-two offenders placed in the child-porn travel group, thirty-six had no known contact offenses at the beginning of treatment.[189] By the end of treatment, twenty-one of those thirty-six offenders admitted to having at least one contact victim.[190] At the beginning of the study, there were fifty-five previously known contact sex offenses in the child-porn travel group, and after self-reports during treatment, the total number of prior contact offenses rose to 1,434.[191] The study's author concluded that 76 percent of internet sex offenders, the members of the child-porn travel group, were also contact sexual offenders.[192]

The 2009 *"Butner Study" Redux* worked with a slightly different population than the earlier study, namely 155 prisoners who had child

(2011) (statement of Stacia A. Hylton, Director, U.S. Marshals Service). The Director of the U.S. Marshals Service said that *The "Butner Study" Redux* was "noteworthy" and insinuated that the research was an essential part of the agency's research base. *Id.* at 33; *see also* Memorandum from Alexandra Gelber, *supra* note 14, at 6 (citing *The "Butner Study" Redux* to support the idea that child pornography presents a grave threat to children).

181. *See* United States v. Houston, 754 F. Supp. 2d 1059, 1063 n.1 (D.S.D. 2010), *aff'd*, 655 F.3d 991 (8th Cir. 2012); United States v. Johnson, 588 F. Supp. 2d 997, 1005–07 (S.D. Iowa 2008).

182. Hernandez, *supra* note 169, at 3.

183. *Id.*

184. Bourke & Hernandez, *supra* note 169, at 185.

185. Hernandez, *supra* note 169, at 2.

186. *Id.* This data was collected from the Presentence Investigation Report, a formal court document prepared by the U.S. Probation Office. *Id.*

187. *Id.* This information was collected from the participants' discharge report, called a psychosexual history questionnaire. *Id.*

188. *Id.* at 3.

189. *Id.* at 5.

190. *Id.* at 4.

191. *Id.*

192. *Id.* at 6.

pornography convictions.[193] The data in this version of the study was drawn from the same sources as the earlier study: the presentencing report prepared by the probation office and the participant's discharge report.[194] However, although focusing only on child pornography offenders, the data from the later study was fairly consistent with the earlier results. At the time of sentencing, 115 of the 155 participants, or 74 percent of the study's population, had no documented contact offenses.[195] By the end of treatment, only twenty-four subjects denied that they had committed hands-on abuse, and 131 subjects admitted that they had at least one hands-on sexual offense, a 59 percent increase.[196] The study's authors contended that the data proved that the dramatic increase in the number of contact offenses "challenges the often-repeated assertion that child pornography offenders are 'only' involved with 'pictures.'"[197] Additionally, the study showed that the vast majority of participants reported that they committed acts of hands-on abuse before seeking out child pornography.[198] This finding supports the idea that those who have molested or abused children are likely to collect child pornography.

However, the Butner Prison Study has been met with fierce criticism, mainly about their methodology and concerns that the results have been overgeneralized. One critique is that the samples are biased because they do not use control groups and that samples based on these convicted offenders are not representative.[199] One critic has noted that the individuals in the study may have represented particularly dangerous offenders, so the conclusions are too broadly drawn.[200] There are also concerns that the program was coercive, and that participants may have had an incentive to lie to receive positive reviews from the study's coordinators.[201] Further, former patients at Butner said that they did not realize that they were research subjects and that the program's emphasis on accepting responsibility led them to "remember" crimes that never happened.[202] Additional concerns include: (1) the study employed an unpublished questionnaire that prevents others from determining its reliability; (2) the

193. Bourke & Hernandez, *supra* note 169, at 185.
194. *Id.* at 186.
195. *Id.* at 187.
196. *Id.*
197. *Id.* at 188.
198. *Id.* at 189.
199. *See* Hamilton, *supra* note 70, at 1705–06; *see also* McCarthy, *supra* note 12, at 40 (noting that a significant limitation of the study is the reliance on a sample of convenience and the noninclusion of a control group).
200. *See* Hamilton, *supra* note 70, at 1706.
201. United States v. Johnson, 588 F. Supp. 2d 997, 1006 (S.D. Iowa 2008) (noting that "the Study's 'whole approach' is rejected by the treatment and scientific community"). *But see* Anderson, *supra* note 178 (quoting Graham Hill, Detective Chief Superintendent of Great Britain's Child Exploitation and Online Protection Centre, who said, "In our view, the therapeutic relationship is the strength of the survey, because these men are more likely to be truthful with therapists they trust than if they're just filling out a questionnaire.").
202. *See* Aviv, *supra* note 122, at 43. Additionally, three prisoners at Butner wrote an anonymous thirteen-page critique of the report, which they said had been "repeated so many times as to become fact in many places and in many minds." *Id.* at 44.

study relies in part on polygraph examinations that are highly unreliable; and (3) the study is not peer reviewed, which is the norm for scientific studies.[203]

The publication process associated with the 2009 data demonstrates that the conclusions drawn by its authors may have been overly broad.[204] The Federal Bureau of Prisons ordered the initial submission for publication withdrawn because the article lacked limiting language, and it was worried that the article's recommendations were too generally drawn.[205] In a 2009 public presentation, one of the study's authors warned against treating the results of the study as conclusive and noted that it did not address how exposure to internet child pornography affects individuals.[206] In sum, although the Butner Study may indicate that child pornography collectors are also likely to have molested children, overly broad conclusions about the connection between the two should not be drawn given the issues associated with the study.

2. N-JOV Study

In the N-JOV Study, Janis Wolak and his co-researchers interviewed investigators across all levels of law enforcement about cases involving internet sex crimes.[207] The goal of the study was to track the extent of child pornography cases in the criminal justice system and to describe their characteristics.[208] The final data set included 429 interviews about cases involving child pornography.[209] Virtually all of the child pornography possessors were white men.[210] The type of child pornography possessed varied: 83 percent of possessors had images of children between the ages of six and twelve, 39 percent had images of three- to five-year-old children, and 19 percent had images of toddlers or infants younger than three.[211]

The results of the study revealed that 87 percent of those in the sample had no known criminal history of sexually abusing a minor prior to the case profiled in the study.[212] The study found that 55 percent of cases involving child pornography possession involved dual offenders who had sexually victimized children or attempted to do so.[213] These dual-offender

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203. *Johnson*, 588 F. Supp. 2d at 1006; *see also* Aviv, *supra* note 122, at 44.
204. Hamilton, *supra* note 70, at 1706.
205. *Id.*
206. Andres E. Hernandez, *Psychological and Behavioral Characteristics of Child Pornography Offenders in Treatment*, UNC INJURY PREVENTION RESOURCE CENTER 10 (Apr. 5–7, 2009), http://www.iprc.unc.edu/G8/Hernandez_position_paper_Global_Symposium.pdf. Hernandez also noted, "Some individuals have misused the results of Hernandez[, *supra* note 169,] and Bourke and Hernandez[, *supra* note 169,] to fuel the argument that the majority of [child pornography] offenders *are* indeed contact sexual offenders and, therefore, dangerous predators." *Id.* at 4.
207. WOLAK ET AL., *supra* note 134, at xi.
208. *Id.* at ix.
209. *Id.* at xi.
210. *Id.* at 2.
211. *Id.* at 4.
212. *Id.* at 3.
213. *Id.* at 16.

defendants were identified via three different avenues: sexual victimization allegations (55 percent of cases), solicitations to undercover investigators posing online as minors (29 percent of cases), and investigations or allegations about child pornography possession (16 percent of cases).[214]

When researchers focused solely on the cases stemming from a child pornography investigation, they found interesting results. They found that 84 percent of cases involved solely child pornography possession, not dual offenders.[215] Investigators found dual offenders in only 14 percent of cases originating as a child pornography possession investigation.[216] This result indicates that in one out of six cases originating with an allegation or investigation of child pornography, a dual offender was identified.[217]

Individuals have used this study to argue that there is an inherent connection between the two crimes. However, in the vast majority of cases beginning as child pornography investigations, the offenders were not molesting children.[218]

3. Notable Pedophilia Study: Seto et al., 2006

A 2006 study conducted by a trio of sex offender treatment specialists attempted to determine whether child pornography offending was a valid indicator of pedophilia.[219] The study used data collected from a sample of patients who were being treated at a mental health clinic in Toronto, Canada, specializing in sexual addictions.[220] The study used phallometric tests, which recorded changes in penile blood volume based on a variety of slides shown to the men, ranging from prepubescent children to adults.[221] Based on the response to the slides, subjects were assigned a pedophilic index.[222] The study separated the 685 patients into four categories: 100 child pornography offenders, 178 men with a history of one or more sexual offenses against victims aged fourteen years and younger, 216 men with a history of sexual offenses against victims aged seventeen years and older, and 191 men who had no history of charges for child pornography or sexual offenses—they were general patients.[223]

The data showed that the child pornography offenders were far more likely to be classified as pedophiles than the general population: 61 percent of child pornography offenders, 35 percent of the child-victim group, 13 percent of the adult-victim group, and 22 percent of the general patients

214. *Id.* at 16–17.
215. *Id.* at 17.
216. *Id.*
217. *Id.* Depending on one's perspective, this can be seen as either an alarmingly high number or a fairly low percentage; this is discussed further in Part IV.
218. It should be noted that the circuit split discussed in Part III details whether evidence of child molestation is correlated with child pornography possession, and the N-JOV Study does not address this correlation specifically.
219. *See* Seto et al., *supra* note 142, at 610.
220. *Id.* at 611.
221. *Id.* at 612.
222. *Id.* at 611.
223. *Id.*

were classified as pedophiles.[224] The authors of the study concluded that "child pornography offending might be a stronger indicator of pedophilia than is sexually offending against a child."[225] Judges and national experts in this field rely on this study to show that child pornography possession can be a marker for prior contact offending and pedophilia.[226]

However, these statements have been challenged, and even the study's authors have cautioned against overgeneralization. In a book published in 2008, entitled *Pedophilia and Sexual Offenses Against Children: Theory, Assessment, and Intervention*, one of the study's authors, Michael C. Seto, explained that more research was necessary to determine the validity of the study's methodology before the results could be broadly relied upon.[227] Further criticism centers around the study's methodology: the study's definition of pedophilic interest is not entirely consistent with the official definition of pedophilia.[228] The study defines a child as an individual up to age fifteen, while the official definition provided by the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (*DSM-IV*) is up to age thirteen.[229] The difference in definition is important because the study may be overly inclusive in its classification of pedophiles. Another concern is that the study itself seems to undermine the conclusion that pedophilia is synonymous with contact offending.[230] The group of individuals with prior child victims was significantly less likely (35 percent) than child pornography offenders (61 percent) to be classified as pedophiles.[231] Pedophilia may explain arousal caused by children, but it clearly does not explain why certain individuals sexually exploit children.

Thus, the three studies explored above reach three main conclusions. First, child pornography possession is an indicator of pedophilia.[232] Second, in cases originating from allegations of child pornography possession, there will often be undetected and unreported instances of sexual exploitation of children.[233] Finally, the studies conclude that before possessing child pornography, many individuals may have already molested a child.[234] However, although these studies demonstrate that child pornography possession may be far more prevalent than the number of

224. *Id.* at 612.
225. *Id.* at 613.
226. *See* United States v. Allen, No. 612-cr-2-8, 2012 WL 1833889, at *5 (W.D. Va. May 18, 2012) (referencing the "well-known" study conducted by Seto); Sharon W. Cooper, *Characteristics of Offenders*, U. MISS. SCH. L. NAT'L CENTER JUST. & RULE L. 7 (Feb. 17–18, 2011), http://www.olemiss.edu/depts/ncjrl/pdf/Feb%202011%20ICAC%20CP/D3_Characteristics_Offenders.pdf.
227. *See* MICHAEL C. SETO, PEDOPHILIA AND SEXUAL OFFENDING AGAINST CHILDREN: THEORY, ASSESSMENT, AND INTERVENTION 34–36 (2007).
228. Hamilton, *supra* note 70, at 1713–14.
229. *Id.* It should be noted, however, that the legal definition of child includes those up to age 18. *See* 18 U.S.C. § 2256(1) (2006).
230. Hamilton, *supra* note 70, at 1712.
231. *See* Seto et al., *supra* note 142, at 612.
232. *See supra* notes 224–25 and accompanying text.
233. *See supra* notes 134, 214–17; *see also supra* notes 169, 185, 189.
234. *See supra* note 198 and accompanying text.

arrests indicates, they do not necessarily substantiate the idea that a child molestation conviction provides probable cause to believe the same individual will possess child pornography.

B. Studies Rejecting the Contention That There Is a Connection Between Child Molestation and Child Pornography

There are several studies that attempt to refute the idea that there is a connection between the possession of child pornography and molesting children. David Riegel, in a study conducted online, contends that child pornography serves as a substitute for molestation, so it is unlikely that those who are accused of molestation would possess child pornography.[235] A similar finding has been supported by a study conducted by Seto and Eke that found that offenders convicted of child pornography possession did not generally begin to molest children after being convicted.[236] Another study conducted a meta-analysis of the available literature on the connection between the two behaviors to point to some major issues with the studies in Part II.A.[237] Finally, a dissertation concluded that sexual offenders are too heterogeneous as a population to be able to draw the conclusion that child molesters are likely to possess child pornography and vice versa.[238] These studies provide an added layer of complexity to a discussion that is often swayed by impassioned rhetoric from victims' rights advocates or prosecutors.

1. Riegel: Child Pornography As a Substitute for Molestation

David Riegel conducted an internet study in 2002 using a 101-item questionnaire which drew anonymous responses from 290 self-identified "Boy-Attracted Pedosexual Males."[239] The questionnaire aimed to determine whether viewing pornographic images of boys exacerbated the tendency for pedosexually inclined men to seek out boys for actual exploitation.[240] Based on the self-reported data, 83.8 percent of participants reported that viewing erotica depicting boys acted as a substitute for sexually molesting an actual boy, and 84.5 percent of participants reported that viewing this material did not increase their tendency toward having sexual contact with a boy.[241] Thus, if child pornography is being used as a substitute for actually molesting children, it seems unlikely that those accused of child abuse would posses it.[242]

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235. Riegel, *supra* note 170, at 321–23.
236. Seto & Eke, *supra* note 170, at 201.
237. Hanson & Babchishin, *supra* note 170.
238. McCarthy, *supra* note 12.
239. Riegel, *supra* note 170, at 321.
240. *Id.*
241. *Id.* at 322.
242. *See id.* at 323; *see also* Michael C. Seto et al., *Contact Sexual Offending by Men With Online Sexual Offenses*, 23 SEXUAL ABUSE: J. RES. & TREATMENT 124, 136, 140 (2011) (reviewing meta-analysis of similar studies and concluding that there is a group of child pornography offenders who do not commit contact offenses).

However, this study has some obvious limitations. First, the results were obtained from a nonrandom and self-selected sample.[243] Second, a longer version of the manuscript was peer reviewed and not published, which may indicate a lack of confidence in the results.[244] The study's author specifically cautioned against drawing overly broad generalizations from the data, writing that, "[g]iven these caveats, it must be emphasized that any extrapolations of these finding to the larger population . . . must take these obvious limitations into consideration."[245]

2. Self-Report Issues: Meta-analysis of Online Data

R. Karl Hanson, a senior research scientist with Public Safety Canada, and Kelly M. Babchishin conducted a meta-analytic summary of the available data pertaining to child pornography offenders in an attempt to assess the differences between online offenders and other types of sex offenders.[246] The study looked at the proportion of internet offenders who also had a history of sexual offenses offline.[247] Their analysis relied on fifteen studies, ten of which used official reports to determine the number of offenses per participant (i.e., arrests, charges, and convictions), and five used self-reports (i.e., data from the Butner Prison Study where the individual participant reported the number of victims).[248] Based on these fifteen studies, there were 3,536 identified online offenders and 18.47 percent were already known to have committed a sexual offense, mostly against a child.[249] Of this total, the vast majority (3,212) of the offenders were identified from official reports, and of this subgroup, 13.3 percent had prior contact sex offenses.[250] The remaining 452 offenders were identified from self-reported information, and 59.1 percent reported prior sexual contact with children.[251] The data that was self-reported by participants reflects a far higher number of victims than the data from the official reports. The wide variation between these two numbers has two possible explanations. It either reflects an overreporting bias in the second set of studies due to the suggestibility of the participants, or it shows that the officially reported data does not adequately capture all of the contact offenses committed by that group because many offenses go undetected.

The researchers concluded that even under conditions that would be expected to produce high disclosure rates (e.g., an established relationship with a therapist), approximately one-half of the online offenders reported no contact with live victims.[252] Thus, it seems that there is a relatively distinct

243. *See* Riegel, *supra* note 170, at 321.
244. *Id.* at 321 n.1.
245. *Id.* at 323.
246. Hanson & Babchishin, *supra* note 170.
247. *Id.* at 5.
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.* at 6.

group of child pornography collectors whose only crimes involve the internet, and who are not actively trying to entice or molest children.[253] Although the study's authors cautioned that further research is needed,[254] if this conclusion were supported it would undermine the idea that child pornography is linked to child molestation.

3. Seto and Eke: Child Pornography Reoffenders As Predictors

Michael C. Seto and Angela W. Eke, whose 2006 study was discussed previously in Part II.A.3, conducted an earlier study in 2005.[255] This study examined the recidivism data of 201 adult male child pornography offenders over a two-and-a-half-year period.[256] The study used information on each child pornography offender from the Ontario Sex Offender Registry.[257] The researchers obtained information about new offenses (defined as new charges or convictions) by accessing a national database maintained by the police.[258]

The study found that child pornography offenders who had committed a previous contact sexual offense were the most likely to reoffend, either sexually or generally.[259] Further, Seto and Eke found that offenders with only child pornography convictions did not progress to sexually molesting minors during the follow-up period.[260] The authors argued that these findings challenge the assumption that all child pornography offenders have a very high risk of committing offenses involving the sexual molestation of minors.[261] The same limitations that apply to many of the other studies also apply to this one.[262] Because the study is based only on official records, it is entirely possible that the child pornography group committed many more contact sexual offenses that were never detected.

This finding is important only if it works both ways (i.e., just as child pornography offenders are not likely to molest children, contact sexual offenders are not more likely to collect child pornography). If it is not accurate both ways, then the study does not conclusively answer the relevant question of whether child molestation is a predictor of possession of child pornography. However, it does support the idea that all sexual offenders should not be lumped together. Instead, it may be important to separate offenders into groups, as this study does.

253. *Id.*
254. *See id.* at 7–8.
255. Seto & Eke, *supra* note 170.
256. *Id.* at 203–04.
257. *Id.* at 204.
258. *Id.* at 205.
259. *Id.* at 207.
260. *Id.* at 208. Only one offender from this group committed a contact sexual offense in the follow-up period. *Id.*
261. *Id.*
262. *Id.* at 208–09.

4. McCarthy Dissertation: Heterogeneity of Child Pornography Offenders

Jennifer McCarthy wrote her dissertation on the relationship between child pornography and child molestation.[263] McCarthy based her research on data from 247 male sex offenders; 176 of the participants were noncontact child pornography offenders, and seventy-one were defined as contact child pornography offenders who had possessed child pornography materials and had sexually abused a child.[264] The data used in the study was gathered from an archive of patients who had undergone an evaluation at the New York Center for Neuropsychology & Forensic Behavioral Science.[265] As part of the evaluation, patients completed an extensive questionnaire on their internet use and sexual history.[266]

The study produced many thought-provoking and relevant results. McCarthy found that 52 percent of the offenders in the study did not receive a diagnosis of pedophilia.[267] Further, of the contact child pornography offenders, only 15 percent were exclusively attracted to children,[268] and of the noncontact group, only 8 percent were exclusively attracted to children.[269] This contradicts the results of the study conducted by Seto et al. in 2006, which found that 61 percent of their sample of child pornography offenders fit the diagnostic criteria for pedophilia.[270] McCarthy's result may indicate that individuals possess child pornography material for reasons other than having a sexual interest in minors, such as inadvertent internet downloads or curiosity.[271]

Even more importantly, McCarthy concluded that there is no causal relationship between the possession of child pornography and the molestation of children.[272] The data shows that 82 percent of contact offenders had sexually abused a minor prior to possessing child pornography.[273] However, the study also showed that criminal history is predictive of committing child sexual abuse.[274] In sum, McCarthy believes that sexual offenders are an extremely heterogeneous group of individuals, and that there is a subgroup of child pornography offenders who could be considered low risk to the community, as their behavior does not extend beyond this material.[275]

The major limitation of this study stems from its sample. The analysis draws on information from official records, and was conducted for

263. McCarthy, *supra* note 12, at 57.
264. *Id.* at 66.
265. *Id.*
266. *Id.*
267. *Id.* at 92.
268. *Id.* at 75.
269. *Id.*
270. *See* Seto et al., *supra* note 142, at 612–13.
271. McCarthy, *supra* note 12, at 92.
272. *Id.* at 102.
273. *Id.* at 101–02.
274. *Id.*
275. *Id.* at 103.

evaluation purposes, not for this study specifically.[276] Thus, there was limited control over how the data was collected, and the variables in the study were based upon information pulled from the survey.[277] In spite of these limitations, the study makes a meaningful contribution to the social science literature by demonstrating that broad generalizations should not be drawn across the sex offender population as a whole.

McCarthy also surveys the other literature about sex offenders, which suggests possible methods of classification. For example, researchers identified six typologies of child pornography offenders: the confirmed collector, who has a large and organized collection of child pornography; the confirmed producer, who is actively involved in the abuse of children; the sexually omnivorous, who have a large and varied collection of pornography which may include child pornography; the sexually curious, who might download a few pictures out of curiosity; the libertarian, who downloads child pornography to assert a right of freedom to the material; and the entrepreneur, who creates websites containing child pornography for financial gain.[278] McCarthy asserts that the research shows that the confirmed producer is the only individual who possibly creates in child pornography.[279] Another classification breaks child pornography offenders into four rather than six groups: periodically prurient offenders, who are akin to the sexually omnivorous offenders; fantasy-only offenders, who have a sexual interest in children but no history of contact with them; direct victimization offenders, who use child pornography to groom potential victims online; and commercial exploitation offenders, who produce child pornography purely for financial gain, akin to the entrepreneur.[280] These classifications are different, but both taxonomies have categories of child pornography possessors who do not actively molest children.

The studies in this subpart produced results that conflict with the results from the studies in Part II.A. The studies in this subpart suggest that individuals may use child pornography as a substitute for molesting children.[281] Further, there may be offenders who progress from molesting children to possessing child pornography, while other individuals who molest children may never possess child pornography. The research in this Part suggests that sex offenders cannot be neatly classified, and that there is a wide variety of motivating factors behind this behavior. The heterogeneity of offenders and motivations should be taken into account when assessing the link between the molestation of children and the possession of child pornography.

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276. *Id.* at 102.
277. *Id.*
278. McCarthy, *supra* note 144*; see infra* Appendix B.
279. *Id.* at 4.
280. *Id.* at 3–4 (citing Ian Alexander Elliott et al., *Psychological Profiles of Internet Sexual Offenders: Comparisons with Contact Sexual Offenders*, 21 SEXUAL ABUSE: J. RES. & TREATMENT 76, 87–90 (2009)).
281. *See* Riegel, *supra* note 170.

III. THE CIRCUIT SPLIT OVER ESTABLISHING PROBABLE CAUSE TO SEARCH FOR CHILD PORNOGRAPHY

Part III of this Note details the conflict between the U.S. Courts of Appeals over the relationship between child pornography and child molestation, and how this relationship should be framed in the context of a search warrant application for child pornography. Courts differ about whether there is a scientifically proven relationship between the two crimes. The understanding of this connection affects the weight that courts are willing to accord allegations or evidence of child molestation in a search warrant for child pornography. Currently, the Second,[282] Sixth,[283] and Ninth[284] Circuits all hold that there is not a substantiated link between child pornography and child molestation; the Eighth Circuit[285] disagrees.[286] In the following Part, this Note examines the varied approaches to this issue.

A. Circuit Courts Finding There Is Currently No Established Relationship Between Child Pornography and Child Molestation

Three circuit courts have held that a child molestation conviction or active enticement of a minor will not suffice to establish probable cause in a child pornography case.

1. The Second Circuit

In 2008, in *United States v. Falso*, the Second Circuit held that although possession of child pornography and enticement of a minor are both crimes, dual criminality does not establish a relationship between the two.[287] In *Falso*, the FBI applied for a search warrant for Falso's home to look for child pornography.[288] However, the specific information tying Falso to the possession of child pornography was limited.[289] The FBI alleged that Falso had "either gained access or attempted to gain access" to a members-only website containing child pornography.[290] The search warrant also alleged that eighteen years prior, Falso had been arrested for sexually abusing a seven-year-old girl but had pled guilty to a lesser misdemeanor offense.[291] In support of the application, an attached twenty-six-page affidavit provided information about the collection of child pornography, including observations from a member of the FBI's Behavioral Analysis Unit.[292] The

282. *See* United States v. Falso, 544 F.3d 110 (2d Cir. 2008).
283. *See* United States v. Hodson, 543 F.3d 286 (6th Cir. 2008).
284. *See* Dougherty v. City of Covina, 654 F.3d 892 (9th Cir. 2011).
285. *See* United States v. Colbert, 605 F.3d 573 (8th Cir. 2010).
286. Although the facts of these cases are different, all of the decisions include discussions about the relationship between child pornography and child molestation. Further, the cases are in dialogue with one another.
287. *Falso*, 544 F.3d at 123.
288. *Id.* at 113.
289. *Id.* at 113–14.
290. *Id.* at 114.
291. *Id.*
292. *Id.* at 113.

FBI affidavit stated that "'individuals who exploit children' use computers to 'locate, view, download, collect and organize images of child pornography found through the internet.'"[293]

The district court authorized the search warrant and cited several factors in support of its probable cause determination: the background information on child pornography, the advertised content of the website, efforts by Falso to access the website, and Falso's prior inappropriate sexual contact with a minor.[294] Following execution of the search warrant, officers recovered 600 printed-out images of child pornography from his home, and Falso admitted to engaging in sexual activity with females in other countries between the ages of sixteen and eighteen.[295] Falso pled guilty to a 242-count indictment and received a thirty-year sentence.[296]

The Second Circuit overturned the lower court's decision.[297] It found that although Falso had tried to access the site, there were no substantiated allegations that he had downloaded or viewed child pornography.[298] However, although the court held that there was not probable cause, it found that the good faith exception to the exclusionary rule applied, so the evidence was admissible.[299]

The Second Circuit discussed the weight that should be accorded to Falso's prior conviction, noting that "[t]he most obvious other factor that might support a finding of probable cause is Falso's eighteen-year-old misdemeanor conviction . . . [b]ut this reasoning falls victim to logic."[300] Additionally, the court noted that Falso's conviction would not be relevant because it was stale, and it did not relate to child pornography.[301] The court found that although both child pornography and sexual abuse of minors involve the exploitation of children, the affidavit submitted by the FBI did not support the conclusion that all or most people who are attracted to minors collect child pornography.[302] Although the court was not convinced by the FBI's attempt to link child pornography and child molestation, it left open the possibility that if the FBI further substantiated its allegations, it might change its mind in future cases.[303]

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293. *Id.* at 131 (Livingston, J., concurring). In a concurring opinion, Judge Livingston noted that in *United States v. Brand*, 467 F.3d 179, 198 (2d Cir. 2006), the Second Circuit stated that possession of child pornography shares a connection with pedophilia. *Falso*, 544 F.3d at 131.

294. *Id.* at 116 (majority opinion). The Second Circuit noted that the district court found Falso's conviction "important" and "highly relevant" to their probable cause determination. *Id.* at 122.

295. *Id.* at 114; *Id.* at 130 (Livingston, J., concurring).

296. *Id.* at 117 (majority opinion).

297. *Id.* at 124.

298. *Id.* at 121. This contradicts FBI Agent Lyons's opinion that there was probable cause to believe that Falso was a collector of child pornography. *Id.* at 114.

299. *Id.* at 129.

300. *Id.* at 121–22.

301. *Id.* at 123.

302. *Id.* The court felt that there was nothing in the FBI's affidavit indicating it was more or less likely that Falso's computer would contain child pornography.

303. *Id.* at 122; *see also* Virgin Islands v. John, 654 F.3d 412, 419–20 (3d Cir. 2011). In a case involving a fact pattern similar to *Falso*, the Third Circuit did not rule out the

2. The Sixth Circuit

In *United States v. Hodson*, the Sixth Circuit addressed a case involving active enticement of a minor, but reached the same conclusion as the Ninth and Second Circuits.[304] In *Hodson*, Detective Juan Passano of the Passaic County, New Jersey, Sheriff's Department Internet Crimes Section, posed as a twelve-year-old boy in an online conversation with the defendant, Michael Hodson.[305] During the conversation, the defendant told Detective Passano that he was a homosexual who liked young boys, that he enjoyed seeing his nine- and eleven-year-old sons naked, and that he had engaged in sex with his seven-year-old nephew.[306] He expressed his desire to perform oral sex on the twelve-year-old boy the Detective was posing as and said he was willing to travel to New Jersey, from Kentucky, to do so.[307] Following an investigation, law enforcement determined that the defendant had only one son and no known nephews.[308] However, a search warrant was sought for Hodson's residence for evidence of child pornography images.[309] Following a search of his residence, forensic experts recovered between ten and fifty images of child pornography on the hard drives of his computer.[310] Hodson challenged the admissibility of the evidence, and a magistrate judge ruled that the search warrant lacked probable cause, but the evidence was admissible based on the *Leon* good faith exception to the exclusionary rule.[311]

In deciding that probable cause was not present, the magistrate judge noted that although the affidavit established probable cause to search for evidence of child molestation, it did not provide any basis to believe that Hodson collected child pornography.[312] The Sixth Circuit concluded that probable cause was clearly lacking and that the *Leon* good faith exception did not apply because it was unreasonable for the officer executing the warrant to believe that probable cause existed to search for child pornography based on the facts of the case.[313] Both the circuit court and the magistrate judge cited *United States v. Adkins*, in which the Sixth Circuit found that "[s]tanding alone, a high incidence of child molestation

possibility that there could be a connection between child molestation and child pornography. *Id.* at 420. However, the police officer's search warrant affidavit had not alleged there was a connection, and had not provided any evidence to support this conclusion. *Id.*

304. United States v. Hodson, 543 F.3d 286, 292 (6th Cir. 2008).
305. *Id.* at 287.
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.* at 288–89.
310. *Id.* at 289.
311. *Id.* at 290–92.
312. *Id.*
313. *Id.* at 293. The court held that any reasonably trained officer should have known that the search described did not match the probable cause described, even though the magistrate judge held differently. *Id.*

by persons convicted of child pornography crimes may not demonstrate that a child molester is likely to possess child pornography."[314]

In *Adkins*, the police obtained a search warrant for the defendant's car and house based on testimony from his wife that he and his wife had sexually molested children, he had a very modern computer that he spent a lot of time on, and he fit the characteristics of a preferential offender.[315] The court upheld the search warrant, concluding that the totality of the evidence, which included more than just evidence of molestation, established probable cause.[316] In *Hodson*, the court affirmed its agreement with the language in *Adkins* but noted that none of the additional information available in *Adkins*, such as the corroborated evidence about Adkins's history of sexual abuse and an FBI affidavit asserting that Adkins fit the characteristics of a preferential offender, was present.[317] The magistrate judge further noted that although he could draw reasonable inferences, he could not supply an empirical link between sexual attraction and pornography possession.[318] Similarly to the judge in *Falso*, the magistrate did not refuse to recognize a link between the two, but instead wanted more proof before deciding.[319] Thus, in *Hodson*, the Sixth Circuit refused to recognize an inherent connection between child molestation and child pornography.

3. The Ninth Circuit

In *Dougherty v. City of Covina*, decided in 2011, the Ninth Circuit reached a similar conclusion as the Second Circuit, albeit with a slightly different focus because of factual differences in the cases.[320] In *Dougherty*, a police officer applied for a search warrant to search Bruce Dougherty's computer and electronic media for child pornography.[321] The search warrant application was based upon allegations that Dougherty, a sixth-grade teacher, had inappropriately touched several of his students.[322] In addition to these allegations, the officer concluded his search warrant affidavit by stating that "based upon my training and experience . . . I know subjects involved in this type of criminal behavior have in their possession child pornography."[323] The district court found the warrant was supported by probable cause.[324]

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314. United States v. Adkins, 169 F. App'x 961, 967 (6th Cir. 2006) (dictum). It should be noted that the language in *Adkins* is dictum. *Hodson*, 543 F.3d at 293 n.4.

315. *Adkins*, 169 F. App'x at 964. In *Hodson*, the court distinguished the search warrant application at hand from *Adkins*, in part because of the FBI expert's information on crimes about "preferential offenders." *Hodson*, 543 F.3d at 293 n.4.

316. *See Adkins*, 169 F. App'x at 967.

317. *Hodson*, 543 F.3d at 293–94.

318. *Id.* at 291.

319. *Id.* at 293–94.

320. Dougherty v. City of Covina, 654 F.3d 892, 899 (9th Cir. 2011).

321. *Id.* at 895–96.

322. *Id.* at 896.

323. *Id.*

324. *Id.* at 897.

The execution of the search warrant led to the temporary seizure of Dougherty's computer, but no charges were filed against him.[325] The Ninth Circuit overturned the district court's probable cause finding.[326] However, the Ninth Circuit held that because they had not previously addressed the question and other courts of appeals were in disagreement, the officers were entitled to qualified immunity.[327]

In its opinion, the Ninth Circuit focused on the insufficiency of the police officer's statements, as well as the weak evidence, mainly consisting of a few students' allegations, in support of the assertion that Dougherty possessed child pornography.[328] The court recognized that there does not need to be direct evidence of solicitation of child pornography to create probable cause, but there must be a "substantial basis" for the finding to support a probable cause determination.[329] In its analysis, the Ninth Circuit noted clearly what is *not* included in the affidavit: facts tying Dougherty's possible molestation of children to possession of child pornography, an expert conclusion that Dougherty is a pedophile, an indication that Dougherty was interested in viewing images of naked children or children performing sex acts, or evidence that he spoke with children about child pornography, videos, or sexual acts.[330]

The court reviewed its sister circuits' stances on the issue. It discussed *United States v. Hodson*, a Sixth Circuit case, in which the court held that probable cause for child pornography possession could not be established based on evidence of child molestation.[331] It noted that the evidence in *Hodson* was more related to viewing children in sex acts and using computers than the evidence at hand, but that nevertheless the Sixth Circuit still held that the connection was not established.[332] The Ninth Circuit also discussed the Eighth Circuit case *United States v. Colbert*, which disagreed with the Ninth Circuit's own finding and held that there was an intuitive relationship between the two crimes.[333] The court noted that in *Colbert* there was evidence that the accused had enticed a child to come to his apartment, implicitly suggesting that this act of enticement could have impacted the Eighth Circuit's analysis.[334]

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325. *Id.* at 896.
326. *Id.* at 899.
327. *Id.* at 900.
328. *Id.* at 898. *But see* Tringali, *supra* note 179, at 996–97. Tringali argues that the Ninth Circuit erred in concluding that there is not a link between child pornography and child molestation because the officer's affidavit, Congress, and independent research have found such a relationship to exist. *Id.*
329. *Dougherty*, 654 F.3d at 898 (citing United States v. Kelley, 482 F.3d 1047, 1051–52 (9th Cir. 2007)). The court further noted that it had not found probable cause to search for child pornography in a separate case when a suspect had received a catalog of child pornography and had ordered four images of possible child pornography. And if there was no probable cause there, it could not exist in *Dougherty*. *Id.*
330. *Id.* at 898–99.
331. *Id.* at 899 (citing United States v. Hodson, 543 F.3d 286, 292 (6th Cir. 2008)).
332. *Id.* (citing *Hodson*, 543 F.3d at 292–93).
333. *Id.* (citing United States v. Colbert, 605 F.3d 573, 578 (8th Cir. 2010)).
334. *Id.* (citing *Colbert*, 605 F.3d at 577).

The court concluded its analysis by stating that the police officer's conclusory statement tying the possible molestation by the defendant to the possession of child pornography did not establish probable cause.[335]

In a concurring opinion, Judge Brewster disagreed with the majority's analysis, stating that "it is a common sense leap that an adult male, who teaches sixth graders, engaged in this type of inappropriate conduct would likely possess child pornography."[336] However, the judge agreed that the officers were entitled to qualified immunity even though he disagreed with the finding that there was no inherent connection between the two behaviors.[337]

B. Standing Alone: The Eighth Circuit Holds That a Link Exists Between Child Pornography and Child Molestation

The Eighth Circuit disagreed with its fellow circuit courts in *United States v. Colbert* and held that there is an intuitive relationship between possession of child pornography and child molestation.[338] The reasoning in *Colbert* has been applied by a district court in South Dakota, where that court held that more empirical evidence would be helpful to determine whether a connection exists.[339]

1. The Eighth Circuit

In *Colbert*, the police sought a search warrant for the defendant's apartment after Donald Gene Colbert approached a five-year-old girl in a public park and spoke with her about movies and videos he had at his home for approximately forty minutes.[340] Police officers approached the defendant, who agreed to a search of his car.[341] In his car, they found a police scanner, handcuffs, and a hat bearing the phrase "New York PD."[342] After finding these items, the police applied for a search warrant of Colbert's apartment, which was issued by a state district judge.[343] The search of Colbert's apartment yielded a number of children's movies, a computer, and numerous compact discs containing child pornography.[344]

The Eighth Circuit upheld the evidence seized pursuant to the search warrant.[345] It found that the search warrant affidavit depicted an older man who was trying to entice a young girl into sexual activity.[346] The court felt

335. *Id.* at 899.
336. *Id.* at 901 (Brewster, J., concurring).
337. *Id.* at 902.
338. *Colbert*, 605 F.3d at 578.
339. *See* United States v. Houston, 754 F. Supp. 2d 1059, 1063 (D.S.D. 2010), *aff'd*, 655 F.3d 991 (8th Cir. 2012).
340. *Colbert*, 605 F.3d at 575.
341. *Id.*
342. *Id.* Colbert justified possession of the handcuffs by saying that he had been employed as a security guard four years earlier. *Id.*
343. *Id.* at 576.
344. *Id.*
345. *Id.* at 579.
346. *Id.* at 577.

that Colbert was not talking about child-appropriate movies in his conversation with the child, and that this further supported their conclusion that he might possess child pornography.[347] The court explicitly stated, "There is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography."[348] However, the Eighth Circuit used supporting evidence from court opinions, not empirical data, when reaching this conclusion.[349] The opinion noted that pedophiles use child pornography as a way to seduce children into sexual activity.[350]

The majority distinguished *Hodson* and *Falso*, which reached opposite conclusions, by noting that neither case involved an application for a search warrant based on a defendant's attempt to entice a child.[351] Further, the *Colbert* court noted that neither case involved an application to search the exact location of the relevant sex crime.[352] In contrast, the search warrant in *Colbert* was drafted in immediate response to the defendant's attempted enticement and focused on Colbert's car, the place Colbert had attempted to lure the child.[353] Further, the Eighth Circuit explicitly disagreed with what it saw as the *Hodson* and *Falso* courts' attempts to create a false distinction between possession of child pornography and other types of sexual exploitation of children.[354] Instead, it said that the experience of those in the field of law enforcement (in contrast to scholars) should be relied on, and that their expertise indicated that there was an intuitive relationship between the two crimes.[355]

Judge Gibson wrote a sharply worded dissent in which he cited *Falso* and argued that the majority relied on a "dangerous assumption" in reaching its conclusion.[356] He felt that in deciding that Colbert was talking to the child about pornographic films, the majority was substituting its own assumptions for the expertise of the detective in the case.[357]

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347. *Id.* at 578.

348. *Id.*

349. *Id.* ("[C]ommon sense would indicate that a person who is sexually interested in children is likely to also be inclined, i.e., predisposed, to order and receive child pornography." (quoting United States v. Byrd, 31 F.3d 1329, 1339 (5th Cir. 1994)) (internal quotation marks omitted)).

350. *Id.* (citing Osborne v. Ohio, 495 U.S. 103, 111 (1990)); *see also* WOLAK ET AL., *supra* note 134, at 18 ("27% of dual offenders had shown or given child pornography to identified victims.").

351. *Id.* at 577–78.

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.* at 579 (Gibson, J., dissenting) ("Although offenses relating to child pornography and sexual abuse of minors both involve the exploitation of children, that does not compel, or even suggest, the correlation drawn by the district court." (citing United States v. Falso, 544 F.3d 110 (2d Cir. 2008))).

357. *Id.* at 580. The dissent quotes testimony from a detective saying that she did not believe Colbert was talking to the child about pornographic movies. *Id.*

2. Practical Application: A District Court's Application of the Eighth Circuit's Finding of an "Intuitive Relationship"

In *United States v. Houston*, the District Court of South Dakota, which is part of the Eighth Circuit, discussed the holding in *Colbert*.[358] In *Houston*, the defendant, Kevin Houston, was accused of molesting his niece when she was four years old, and she told her mother that she may have seen the defendant looking at naked boys' and girls' butts on the computer when she was five or six.[359] The child's mother checked the computer's history later and found "'some pictures of questionable age and sexual contact.'"[360]

The court acknowledged the holding in *Colbert*, but found that "whatever intuitive relationship there is between acts such as child molestation or enticement and the possession of child pornography will not in every instance support probable cause for a search for child pornography."[361] In assessing whether probable cause was present, the court reviewed the empirical evidence about the connection between the two crimes.[362] It noted that although intuitively there may seem to be a strong connection between the molestation of children and possession of child pornography, research challenged this assumption.[363] While the court referenced research that suggested that there may be a stronger connection between possessing child pornography and subsequently molesting a child, it concluded its analysis with the hope that further research would be conducted to help the court move away from relying on common sense and intuition.[364]

IV. TOO BIG A LEAP: RELEVANT RESEARCH INDICATES THAT THE EIGHTH CIRCUIT'S INTUITION-BASED APPROACH IS MISTAKEN

This Part evaluates the social science research about the connection between child pornography and child molestation, and applies it to the circuit court split discussed in Part III. First, this Part argues that the social science research indicates that sex offenders are a heterogeneous population and that one cannot accurately predict whether a contact sex offender will possess child pornography. Next, this Part assesses the circuit courts' analysis of the connection between the two behaviors and concludes that the Second, Sixth, and Ninth Circuit's approach is correct, and that the Eighth Circuit's analysis of the connection is misguided. Finally, this Part argues that courts should incorporate social science research into their decisions involving the establishment of probable cause in child pornography cases instead of relying upon intuition and affidavits produced by the FBI.

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358. United States v. Houston, 754 F. Supp. 2d 1059, 1062–63 (D.S.D. 2010), *aff'd*, 655 F.3d 991 (8th Cir. 2012).

359. *Id.* at 1062.

360. *Id.*

361. *Id.* at 1063.

362. *Id.* at 1064. The court cited to the Butner Prison Study and the Seto and Eke studies from 2005 and 2006, among others. *Id.*

363. *See id.*

364. *Id.*

A. A Mixed Bag: Sex Offenders Are Too Heterogeneous To Neatly Categorize

There is a growing body of research about sex offenders, including child pornography possessors, but the limitations of the data must be clearly addressed. In general, much of the research into sex offenders relies upon self-reporting or official records, both of which can be manipulated and are not entirely transparent.[365] Further, prosecutors and law enforcement officials have selectively relied upon certain studies to assert that a child molestation conviction or evidence of child molestation is an accurate indicator of whether that individual will possess child pornography.[366] For example, law enforcement officials and others have used the Butner Study, almost exclusively, to argue that there is an inherent connection between child pornography and child molestation.[367] However, the Butner Study is unreliable because of significant flaws in its methodology, and other researchers have not replicated its findings.[368]

Other studies, like Seto and Eke's 2006 research, asserted that child pornography possession is possibly a greater indicator of pedophilia than molesting a child.[369] However, being a pedophile has not been proven to be a predictor of behavior. But, even assuming that child pornography possession is a "marker" for prior contact offending[370] (a result that has been contradicted by the research of Jennifer McCarthy[371]), that result does not support the contention that a conviction for molestation will establish probable cause for the possession of child pornography. Instead, that study could potentially be used to establish probable cause to search for evidence of molestation in a case where an individual has been found to possess child pornography.

Even if the studies discussed in Part II.A of this Note are presumed to be scientifically reliable, their results are contradicted by the studies presented in Part II.B. For example, the results of David Riegel's online study conducted in 2002 found that child pornography served as a substitute for an individual's desire to sexually molest children.[372] However, it should be noted that the study is subject to the same self-reporting issues as the Butner Study.[373] Most importantly, the lack of consensus among the different research suggests that it is not possible to accurately isolate the characteristics of sex offenders to predict whether a contact sex offender will possess child pornography. Instead, the best conclusion to draw from the research is that sex offenders, particularly child pornography possessors,

365. *See supra* notes 246–51 and accompanying text.
366. *See supra* Part II.A.
367. *See supra* notes 167–78 and accompanying text.
368. *See supra* notes 199–206 and accompanying text.
369. *See supra* notes 225–26 and accompanying text.
370. *See supra* notes 225–26 and accompanying text.
371. *See supra* notes 267–73 and accompanying text.
372. *See supra* notes 240–41 and accompanying text.
373. *See supra* notes 243–45 and accompanying text.

are a diverse group.[374] Other literature has suggested that the social science research supports the existence of a general correlation between child molesters and possessors of child pornography, and that this correlation should be enough to support a finding of probable cause.[375] However, as discussed in Parts I and II, child pornography possessors are motivated by many different factors, and until these factors can be individually studied, social science research should not be relied upon to establish probable cause based upon a mere correlation.

B. Circuit Courts: Intuition Has No Role in a Probable Cause Analysis

Courts evaluating search warrant applications for child pornography based on allegations of prior molestation or convictions should stop relying on intuition and the word of police officers; instead they should consider it as one of several factors in the "totality of the circumstances" probable cause analysis. The Second, Sixth, and Ninth Circuits have all held that to establish probable cause for a search warrant in a child pornography case, allegations of child molestation or a child molestation conviction will not suffice.[376] In *Dougherty*, the Ninth Circuit case, and *Falso*, the Second Circuit case, the courts were presented with affidavits from law enforcement officers that alleged a connection between child pornography and the behavior in question in each case.[377] Neither of the affidavits cited to any sort of social science research to establish this connection. In *Hodson*, the Sixth Circuit case, the search warrant contained no information about a connection between child molestation and child pornography; instead it just pointed to an online conversation between the defendant and a detective.[378] These courts were not opposed to recognizing a connection between child pornography and child molestation, but found that the conclusory statements of law enforcement officers were not enough to justify doing so.[379] If the social science research develops to a point where specific conclusions can be drawn about the connection between a child

374. *See supra* Part II.B.

375. *See* Kathryn A. Rigler, Comment, *Child Pornography and Child Molestation: One and the Same or Separate Crimes?*, 9 SETON HALL CIRCUIT REV. 193, 216 (2012); Megan Westenberg, Comment, *Establishing the Nexus: The Definitive Relationship Between Child Molestation and Possession of Child Pornography As the Sole Basis for Probable Cause*, 81 U. CIN. L. REV. 337, 349 (2012). Neither of these comments fully explores the social science literature before coming to their conclusions.

376. *See supra* Part III.A.

377. *See supra* notes 292–93, 323 and accompanying text. In *Falso*, the search warrant affidavit was submitted by an FBI agent; it included general information about child pornography collectors and alleged that they were likely to be pedophiles. United States v. Falso, 544 F.3d 110, 113 (2d Cir. 2008). In *Dougherty*, the search warrant affidavit was supported by a police officer who cited fourteen years of experience, as well as training, to argue for a connection between the two behaviors. Dougherty v. City of Covina, 654 F.3d 892, 896 (9th Cir. 2011).

378. *See supra* notes 304–08 and accompanying text.

379. *See Falso*, 544 F.3d at 122 ("Perhaps it is true that all or most people who are attracted to minors collect child pornography. But that association is nowhere stated or supported in the affidavit.").

molestation conviction and the possession of child pornography, and search warrant affidavits cite this evidence, these courts may change their opinion.[380] However, the courts correctly recognized that although child molestation or enticement of a minor are terrible crimes, probable cause to search for evidence of child molestation does not translate into probable cause to search for child pornography.

In *Colbert*, the Eighth Circuit did not look for a substantiated connection between Colbert's attempt to lure a five-year-old girl to his apartment and the search warrant for child pornography.[381] Instead, the court held that there was an "intuitive relationship" between child molestation or enticement and the possession of child pornography.[382] The court distinguished *Hodson* and *Falso* by pointing out that neither case involved the active enticement of a minor.[383] However, in *Hodson*, the defendant had actively expressed a desire to travel from Kentucky to New Jersey to perform oral sex on the twelve-year-old boy whom he believed he was talking to.[384] Thus, the Eighth Circuit's characterization of the case seems misleading.

The Eighth Circuit explicitly scoffed at the notion that social science research could play a role in a probable cause analysis for child pornography, citing *Gates* in support of the conclusion that "[e]vidence adduced to support probable cause must be 'weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.'"[385] This approach is flawed. Although police officers may have extensive experience with investigating and then helping prosecute child sex offenders, they are not unbiased. It is in their interest to argue in favor of a connection between the two behaviors because it will help them establish probable cause in scenarios where they may not otherwise be able to obtain a search warrant.[386] Instead of trusting blindly in the word of a potentially biased police officer, or assuming based on intuition that evidence of past child molestation or enticement is a predictor of child pornography possession, courts should balance these considerations in their "totality of the circumstances" probable cause analysis.

C. Courts Should Incorporate Social Science Research into Their Probable Cause Determinations in Child Pornography Cases

Courts should make an effort to incorporate social science research into their probable cause analyses.[387] Although prosecutors and defense

380. *See supra* notes 303, 319 and accompanying text.
381. *See supra* notes 349–54 and accompanying text.
382. *See supra* note 321.
383. United States v. Colbert, 605 F.3d 573, 577–78 (8th Cir. 2010).
384. United States v. Hodson, 543 F.3d 286, 287 (6th Cir. 2008) .
385. *Colbert*, 605 F.3d at 578. (citing Illinois v. Gates, 462 U.S. 213, 232 (1983)).
386. *See* Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971) (justifying the magistrate judge–issued search warrant requirement because police officers cannot be expected to maintain neutrality in regards to their own investigations).
387. This idea was suggested in *Houston*: "Rather than relying upon intuiting to establish or deny the strength of relationships between child pornography and child molestation,

attorneys may argue that this type of information goes beyond the traditional purview of the court, it is no different from how the court handles other scientifically based evidence like eyewitness identifications or battered woman syndrome.[388] Further, prosecutors may already be attempting to sway judges' opinions by using unreliable studies like the Butner Prison Study, so judges should conduct an impartial review of the available literature. In areas of the law where one's common sense intuition contradicts the social science scholarship, courts have a duty to review the research before authorizing an invasive search of an individual's home. Currently, the research indicates that child pornography collectors are a heterogeneous group of offenders.[389] They are motivated to collect by different reasons, and they cannot be coherently classified as a single type of offender. Instead, there are some who use child pornography as a substitute for molesting children, while others produce the material and use it to groom future victims.

Given the wide variety of offenders and motivations, courts should ask to be briefed on the connection between child molestation and child pornography in cases where a search warrant is based mainly on this type of evidence. Until courts feel confident that there is an empirically established connection between the two behaviors, they should not issue search warrants in these more tenuous cases.

CONCLUSION

The stakes in this area of the law are high. A child pornography conviction has extremely serious consequences, such as a very lengthy prison sentence, required registration as a sex offender, along with the shame and stigma that attach to a crime that society views as morally repugnant. Over the past fifty years, Congress and the courts have become increasingly punitive in regards to child pornography possession.[390] The circuit court split over whether probable cause to search for child pornography can be established based on an "intuitive relationship" between the two crimes gives too much credit to the "gut instincts" of law enforcement officials and judges. When a crime is as heinous and morally depraved as child pornography, relying on instinct alone can lead to overbroad and unsupported searches. Instead, investigators, courts, and prosecutors should look to the developing body of social science research to determine whether this connection is substantiated. Currently, the research merely tells us that sex offenders are diverse and not easily categorized, so

additional research would be of assistance. Common sense or intuiting can only go so far." United States v. Houston, 754 F. Supp. 2d 1059, 1064 (D.S.D. 2010), *aff'd*, 655 F.3d 991 (8th Cir. 2012).

388. *See* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1194–95 (1993); Bennett L. Gershman, *The Eyewitness Conundrum*, 81 N.Y. ST. B.J. 24, 25 (2009).

389. *See supra* note 275.

390. *See supra* Part I.C.

we should require more than past evidence of molestation to support probable cause for a search for child pornography.

APPENDIX

A. Research Summary

Study Name	Main Finding	Criticisms
Butner Prison Study	Child pornography offenders are likely to have committed contact sex offenses, which are often undetected.	No control group, overly broad conclusions, unpublished questionnaire, self-reporting biases.
N-JOV Study	84 percent of child pornography offenders did not victimize a child, but one out of six was a dual offender.	Data based on self-reporting by investigators.
Seto et al.: Notable Pedophilia Study	Child pornography offending is an indicator of pedophilia and may be a "marker" for contact offending.	More research needed to confirm results, inconsistent definition of pedophilia.
Riegel: Online Survey	Child pornography is a substitute for contact offending against a child.	Self-reported data based on self-selected online survey, longer study not published.
Hanson and Babchishin Meta-analysis	Data from self-reported studies of internet offenders depicts far more child sex offenders than official studies. Group offenders may exist who just choose to possess child pornography.	Further research needed before results can be considered. Not original research, but meta-analysis.
Seto and Eke: Later Offending of Child Pornography Offenders	Individuals convicted of child porn possession did not progress to sexually molesting minors during the follow-up period.	Based only on official reports, so contact offenses may not have been detected.
McCarthy Dissertation	The majority of offenders were not classified as pedophiles; there is no causal relationship between the possession of child pornography and the molestation of children.	Sample is drawn from official records, questionnaire not specifically for this dissertation.

B. Table 8 from Jennifer A. McCarthy, The Relationship Between Child Pornography and Child Molestation[391]

Typologies	Features
Confirmed Collector	The individual has a large collection of child pornography, which is often meticulously organized.
Confirmed Producer	The individual is actively involved in the abuse of children and the images of the abuse are given to others with similar sexual interests.
Sexually Omnivorous	The individual may not be primarily interested in child pornography but instead has a pornography collection that depicts a wide range of sexual activities, including child pornography.
Sexually Curious	The individual may download a few pictures because of curiosity. This could possibly lead to ongoing involvement in this behavior.
Libertarian	The individual downloads child pornography to assert a right to freedom of access to this material.
Entrepreneur	The individual creates web sites containing child pornography for financial gain. He may also be involved in other types of pornography.

391. *See* McCarthy, *supra* note 12, at 48.